Law without Nations: An Introduction

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To speak about law without nations is to imagine the nightmarish possibility and the utopian. The possibility of law in the absence of a nation would seem to empty law of its animating spirit, to sever it from its source and meaning. At the same time, law divorced from nations would seem to clear the ground for a cosmopolitan legality free of the prejudices or idiosyncrasies of distinctive national traditions and universalist in its accents. These dystopian and utopian imaginings inspire and invigorate thinking about law without nations.

Law without Nation-States: Transitional Developments

The term "nation" has vexed political thinkers from Herder and Fichte to Benedict Anderson and Homi Bhabha. In his famous lecture "Qu-est-ce qu'une nation?" delivered in Sorbonne on March 11, 1882, Ernst Renan canvassed all the standard definitions of "nation" and found them all wanting.[1] The "exclusive concern with language"; the "excessive preoccupation with race"; the fixation on "theological dogma"; the "arbitrary" and "fatal" elevation of geography to "a kind of limiting *a priori*"—none of these, Renan insists, provide an adequate definition of "nation," as they all suffer from the problem of over- or underexclusivity.

Not all legal and political thinkers, however, have been equally vexed by the problem of definition. Today there is a tendency to treat the term "nation" as no more than shorthand for the term "nation-state," the form of political organization that arose in Europe in the wake of the Peace of Westphalia. This political form, with its familiar sovereign powers, centralized administrative systems, and monopoly of legitimate force, now serves as the principal vehicle for the

organization of political life for most of the world's inhabitants.[2] From this perspective, questions such as whether Belgium, with its French and Flemish halves, actually should be considered a state with two nations (a question we can ask of Canada, too) are largely irrelevant. The term "nation-state" serves, then, not to delimit or restrict the designation to only those states that have certain "bonus" features, such as a common linguistic or cultural heritage; rather, the insertion of "nation" serves merely to denote a level of analysis directing attention to the national sovereign itself. So understood, it matters not whether a nation arose organically from a long historical tradition or was artificially carved up by imperial mandate; it matters not whether it is ethnically and linguistically homogenous or is multicultural and multilingual; what matters is that it exercises sovereign control over a defined geographic area and a specifiable population.

If we follow this lead, and treat the "nation" as shorthand for "nation-state," then the phrase "law without nations" has an oxymoronic ring—at least from the perspective of legal positivism. Here Hobbes will be our guide. In *The Leviathan,* the brilliant theory of the state written against the backdrop of the English Civil War, Hobbes posited a state that is created artificially through the weak force of formal contract between warring individuals.[3] It is hard to exaggerate the radical quality of this vision, even if we accept, as Hobbes reminds us, that his account is meant to be heuristic and analytic, not historical. The idea alone that communities are bound together not by religion or extended family or shared traditions or common industry, but by a contract designed to staunch the mutual infliction of violence is indeed bleak. Durkheim observed that contract can never fully bootstrap its own efficacy—a regime of contracts always presupposes some precontractual social solidarity to make the system work.[4] Hobbes's scheme, however, does not presuppose any precontractual social glue—no nation precedes the creation of the state. For Hobbes, then, the social contract is binding not because it is a promissory instrument that appeals to pre-existing customs and norms. To the contrary, a contract predicated on mere trust is for Hobbes void. Contracts are binding only when "there be a common Power set over them both, with right and force sufficient to compel performance."[5]

For all its bleak simplicity, this account, as others have noted, appears to raise intractable problems.[6] The forging of the social contract is a necessary step toward exiting the state of nature—the war of all against all—and creating

the Leviathan, and yet in the absence of the state, the contract is void, without prescriptive force. Thus the social contract, if it is to be binding, presupposes the very state that it calls into being.

Whether Hobbes provides a way out of this dilemma is not our central concern—though his insistence that the Leviathan presupposes no social solidarity will be of relevance to our discussion of the relationship between state and nation. Of more direct relevance is the strong relation that Hobbes posits between law and the state.[7] The making of law is not simply one of the functions of the state; the state is the precondition of law. Without the state, there can be no law in the Hobbesian scheme: "Where there is no common Power, there is no Law."[8] To speak of any internal limits on the law-making power of the state, thus, makes no sense in Hobbes's world; the sovereign, while called into being by the social contract, cannot, by definition, be bound by its terms. Inasmuch as the sovereign's power overweans and makes all other contracts and laws enforceable, he himself cannot be said to be constrained by any law or contract; his power is absolute. Likewise, it is meaningless to speak of any external limits on the sovereign's law-making power. For Hobbes, there can be no global power or body of law superior to the sovereign; if such a power existed, *it would be sovereign*. Sovereignty is thus absolute and indivisible. Nations can, of course, enter into treaties, but these lack a truly legal character in the absence of a power capable of enforcing their terms. They are like the promissory agreements entered into in the state of nature: void. In the absence of an overarching sovereign, each state finds itself in a state of nature vis-à-vis all others.

From this perspective, it is easy to see why the phrase "law without nations" would leave a strict Hobbesian baffled. If law is exclusively the creation of the state, then it is impossible to imagine law qua law existing in the state's absence. We can imagine principles of prudence, maxims of reason, notions of justice existing in the absence of states, but not law as an enforceable code of conduct designed to solve social disputes. And just as law is the creation of the state and there can be no law without the state, the strict positivist must insist—as did influential latter-day exponents such as H. L. A. Hart and Hans Kelsen—that the state's power to make laws is plenary.[9]

And yet the term "law without nations" can be understood in a very different sense. That is, one might continue to treat "nations" as convenient shorthand for "nation-states," yet still parse the phrase in a manner altogether different

from Hobbes. We can trace this rival tradition back to another sixteenth-century thinker, Hugo Grotius. While Grotius, like Hobbes, was a strong defender of sovereign prerogative, he did not consider "international law" a contradiction in terms. Law, in his lexicon, also included long-agreed-upon practices of civilization—even in the absence of law-making bodies capable of specifying their exact content, adjudicatory instruments capable of resolving the disputes they might give rise to, and executive institutions with the power to enforce sanctions upon transgressors.[10]

Although Grotius never fully imagined the development of mechanisms of world governance, certainly the past sixty years have witnessed a remarkable development in international law. Perhaps the most spectacular development has taken place in the area of criminal law. It is no exaggeration to claim that our very understanding of what the law is and what it can do has been radically and irrevocably changed as a result of its contact with atrocity—first in the form of Nazi crimes, and more recently in the shape of atrocities in the Balkans and genocide in Rwanda. At the most basic level, this has led to a paradigm shift in our understanding of sovereignty and its prerogatives.

The revelations of Nazi atrocities led Karl Jaspers to frame the term *Verbrecherstaat,* the criminal state, a notion meant to name and denote a phenomenon that lay beyond the ken of the standard model of liberal positivist jurisprudence.[11] Jaspers formulation demanded that the state be seen not as the defender of order, the classic Hobbesian image, but as the very agent of criminality. The international tribunal at Nuremberg formalized this recognition, based as it was on the notion that international law *authorized* the puncturing of the shield of sovereignty that traditionally had insulated heads of state from international legal scrutiny.[12]

Today we accept without argument the idea that sovereign state actors responsible for atrocities must answer for their conduct in courts of criminal law—be they domestic, international, or of a hybrid character. But we run the risk of forgetting how deeply radical this idea was before the Nuremberg trial of the major Nazi war criminals.[13] While the Nuremberg precedent lay moribund for much of the Cold War, it has experienced a remarkable revival in recent years. First, we find the creation of various international courts—such as the ad hoc Yugoslavia and Rwandan tribunals, as well as the permanent International Criminal Court—capable of trying heads of states for violations of

international law. Notwithstanding the mistakes committed by the prosecution in the Milosevic trial and the disappointment occasioned by the defendant's untimely death, the trial itself represented something remarkable: the first time in human history that a former head of state answered for his conduct before an international court.[14] Second, and relatedly, we witness the development of a rich jurisprudence of three international crimes—crimes against humanity, genocide, and war crimes—that have largely severed any connection to the core meaning of the concept of "international."[15] Indeed, these crimes can better be described as transcending the nation-state, or as "supranational," "cosmopolitan," or "universal," as their norms are binding and obligatory upon all nations—even those that are not signatories to the Geneva Convention or the Genocide Convention.

The idea of law without nations conjures these remarkable developments in international criminal law but is not limited to them. Although pictures of Goering in the stand at Nuremberg or of Milosevic in The Hague may provide the most arresting images of law without nations—indeed, of law standing above and against the nation-state—equally remarkable developments have occurred on the more prosaic level of public and private international law. In certain respects, the European Union stands now as a semiautonomous supersovereign; the decisions and judgments of its various institutions, such as the European Court of Justice, the European Commission, and the Council of Ministers, are binding upon domestic national courts of its member states.[16] International trade organizations and institutions likewise enjoy unusual authority vis-à-vis nation-states; the World Trade Organization is perhaps the best known for its power to resolve disagreements between sovereign states through binding dispute resolution.[17] Although these judgments may lack the full panoply of coercive sanctions available to a state enforcing a judgment against a citizen, it would be querulous to deny that these judgments have a distinctly legal character. Clearly, they too represent the development of bodies of effective law that stand over and above the nation-state.[18]

The normative implications of these developments remain, of course, a matter of controversy. Certainly there are those, particularly within the human rights community, that see the development of a viable body of international criminal law as an entirely salutary, if long overdue, phenomenon.[19] International criminal law promises, in this view, to put an end to the kind of impunity

that reprobate state actors have all too long enjoyed. Others see the creation of institutions such as the International Criminal Court (ICC) in less sanguine terms.[20] It is well known that former president Clinton signed on to the ICC only in the last days of his administration, and then with many reservations; the Bush administration promptly unsigned the treaty and worked with determination to undermine the fledgling court just as it was opening shop.[21] Critics of the ICC have argued, not without reason, that international tribunals can be used to settle political scores, a matter of greater potential concern to the United States than, say, to Finland. Critics of international law also point to a "democracy deficit"—namely, the idea that international norms are often framed by administrative agencies or organizations that lack democratic forms of participatory governance.[22] To permit such norms to trump domestic national law is to permit nondemocratic practices to trump democratic ones. For some critics, the mere quoting of international sources in the decisions of the U.S. Supreme Court represents an unsupportable intrusion upon U.S. sovereignty and upon our right to steer our constitutional destiny free of external interference.[23]

It is not our purpose, or that of our contributors, to take sides in this controversy. One point, of an analytic character, needs, however, to be emphasized. Much of the literature on the clash between domestic-national and international law—regardless of the normative position taken—shares a common feature: it tends to view the struggle in zero-sum terms. Gains in international law come at the expense of national sovereignty; the strengthening of national sovereignty, by contrast, represents a weakening of international norms and institutions.[24] This view, it bears repeating, has been a stable feature of the ongoing debate, accepted by the champions of international law on the one hand, and the nation-state on the other. Yet as we shall see, it is precisely this assumption that is interrogated by the essays in the present volume.

Bringing the Nation (*das Volk*) Back In

There is, however, another way to conceptualize the meaning of "law without nations." This requires taking the term "nation" as something other than a shorthand for "nation-state." This returns us to our point of departure: the effort of theorists to offer a satisfactory definition of the "nation" without reducing it to a synonym for a sovereign state.

To provide but one example, consider the case of Germany. Over the entrance of the Reichstag, once again the seat of the German parliament, stands the famous dedication in bronze letters: *Dem Deutschen Volke*. "To the German People." The eager tourist who dutifully queues up to tour the building burdened with history soon encounters a fresh dedication inscribed in the Reichstag's main courtyard: *Der Bevölkerung*. "To the Population." Compared with "To the German People," "To the Population" sounds flat, drearily actuarial, better placed before the entrance to a bureau of the census than the national legislature.

The original inscription was added to the Reichstag in 1916 with the grudging support of Kaiser Wilhelm II to express support for the principle of parliamentary democracy, if not supremacy.[25] The bronze lettering was forged by S. A. Lövy, a successful bronze foundry owned by a Jewish family. The Lövy family, at least in part, later perished in Nazi death camps. To call this ironic captures only one dimension of the tragedy that engulfed the German nation and its Jewish population. Certainly the term "To the German People" had a more innocuous ring in 1916 than it would twenty years later in the wake of the Nuremberg laws that stripped German Jews of their full citizenship and paved the way for their exclusion from German society, their deportation, and their ultimate extermination.[26]

But even at the time of its original forging, the term *Volk* meant something more than can be denoted with the word "people," a mere amalgam of persons. Indeed, to translate *das Volk* as "people" is itself unsatisfactory, as it is also the German term for "nation." As such, *das Volk* denotes a people bound by something deeper than mere political ties; it speaks of a nation conjoined by tradition, memory, and history. *Das Volk* is a romantic ideal, a mythic body.

Historically *das Volk* was never coterminous with citizenship in the German state. *Das Volk* was at once a term of exclusion, barring membership even to those born and raised within Germany's territorial limits, and irredentist, sweeping in ethnic Germans far beyond the state's borders. Americans have long been familiar, if at times begrudgingly, with the concept of a hyphenated identity. It is meaningful to speak of a Japanese-American, a Jewish-American, an African-American. For most of German history, that was not the case—the term "German Jew" was oxymoronic, contradictory, on the order of "whitish black" or "largely small." One could be a German or a Jew, but not both; the one

excluded the other.[27] This idea of nationhood found early expression in Fichte's famous *Reden an die deutsche Nation (Addresses to the German Nation)*, the lectures that the philosopher delivered to the Berlin Academy over the course of the winter of 1807–8.[28] For Fichte, nationhood was defined in terms of the genius of language and the chauvinistic prerogatives of blood.[29] This definition, in turn, was later challenged by Ernst Renan, who eschewed an ethnic definition of nationhood in favor of a "spiritual principle." To be part of a nation, Renan insisted, was to share "a rich legacy of memories" and the desire "to perpetuate the value of that heritage that one has received in undivided form."[30]

Nationhood, for Renan, was defined in terms of a "large-scale solidarity," constituted by "having suffered, enjoyed, and hoped together."[31] Even this definition may sound odd to contemporary ears, but in its time it represented a marked advance over the aggressively ethnic definition of Fichte. Renan's "spiritual" idea of nationhood also importantly anticipated and influenced Benedict Anderson's influential view of the nation as "an imagined community"—that is, a community whose members "will never know most of their fellow members, meet them, or even hear of them, yet in the minds of each lives the image of their communion."[32]

However much these definitions of the nation may differ, they share an important common feature: they all express a similar normative understanding of the relationship between the nation and the state, and by extension, its laws. Today the term "nation-state" is largely a pleonasm. For classic theorists of the nation, however, the nation-state was meant as a term of restriction. The state was to serve as the vehicle of a specific nation, and each nation aspired to its own discrete state. To quote Anderson, "[T]he gauge and emblem of this freedom [of the nation] is the sovereign state."[33]

Germany remains a prime example of a state forged in the latter decades of the nineteenth century in the name of a nation. France remains a more problematic example, as many historians insist that the French nation was in fact an invention of the state, not vice versa.[34] (Often mentioned in this connection is the fact that only about half the population of France could speak French at the time of the revolution.) And then there are more problematic examples still: Belgium—a state with two nations; ditto for Canada.

But if we bracket the historical question of how specific national entities are to be characterized or classified, and focus our attention on the theoretical

model of nationhood, the contrast to Hobbesian statism could not be sharper. Hobbes, as we recall, understood the state as an entity created through thin bonds of contract among private individuals united by nothing more than their mutual distrust of each other. The state, in this view, was to serve no higher purpose than to secure order and peace over a specific territory; it was to protect the subjects of the state from *each other*.

For Fichte and Renan, notwithstanding their disagreements, the state was to serve the noble purposes of the nation. Far from simply an instrument to serve the self-interest of its subjects, the state was understood as a vehicle for the pursuit and advancement of common national projects. Individual life was to gain meaning and purpose by attaching itself to such collective goals. Held together by nothing more than the weak ties of promissory contract—ties unenforceable absent the threat of sanction from the state—the Hobbesian state was nothing more than a thing of convenience and force. The nation-state of Fichte and Renan, by contrast, was bound by precontractual forces of solidarity forged of common language, heritage, and ambitions.

The classic nationalist theories of the nation-state also defended a particular understanding of law. In contrast to the Hobbesian model, law was meant to do something more than simply keep violence between the subjects of a state in check. Law, as Roger Cotterrell has put it, was meant to embody and express "matters of tradition, affect, belief and ultimate values."[35] This vision found perhaps its purest expression in Montesquieu's influential text *The Spirit of Laws*, in which the great French legal thinker posited a particular quality, temper, and spirit to each system of national law.[36] Far from the cosmopolitan ideal discussed earlier, and far from the liberal idea that we will presently consider in greater detail, the nation-state aspired to *national* law: a legal system whose institutions, norms, and procedures would express and reflect the particular genius, values, and commitments of a particular *Volk* or people. From this perspective, the term "law without nations" expresses either something impossible—law *must* reflect national character—or something dystopic: the kind of artificial or inorganic legality thrust on a people from outside. That this latter vision can have its own profoundly dystopic quality should, of course, be noted; we need but recall Carl Schmitt's lethal attacks on the jurisprudence and legal norms of the German Weimar Republic. Weimar law, for Schmitt, reflected the legal thinking of internationalists—namely, Jews—and as such failed to express

the values and principles of the German nation. Schmitt insisted that Jewish jurists embraced a quintessentially Hobbesian understanding of law, one alien to the German nation.[37]

Law without Nations: The Liberal View

Let us return for a moment to the second, more recent, dedication that the casual tourist encounters in the Reichstag. *Der Bevölkerung*—"To the Population." Compared with *das Volk, die Bevölkerung* is a term without myth and romance. It speaks of an aggregate of persons, an accumulation of demographic groups. "To the population"—the state no longer declares its subservience to the *Volk*; it now serves all within its territorial bounds—citizens and noncitizens alike; Germans and non-Germans; all possible groups. In its flatness and straightforwardness, the population is a quintessential term of liberalism.

So understood, the phrase "law without nations" expresses an altogether different notion, one that is quintessentially post-Hobbesian and liberal. In this vision, the law is not the expression or the reflection of any particular national spirit; nor is it the tool for the furtherance of any particular national agenda, project, or vision of the good. The jurisprudence of nationalism insists on a unity of law and morality: the law is to be the expression of the moral commitments and principles of the people. The jurisprudence of liberalism insists on no such correspondence.

In liberalism, we encounter the famous separation thesis.[38] Law *may* express the content of morality, but it *need not* do so to be law. There is, in the liberal lexicon, no necessary or formal connection between law and morality. As odd as the separation thesis may appear—and it has been attacked by legal thinkers from Carl Schmitt and Karl Larenz to Stanley Fish and Catherine MacKinnon—it remains one of the great signposts and achievements of liberal legality. In this system, law intervenes to promote no particular vision of the Good; it is not a tool of moral perfectionism and teleological nationhood. Rather, the law does no more than establish and enforce basic principles of justice that permit each individual or group to pursue his, her, or its vision of the good.[39]

In this regard, liberal legality builds on the tradition of Hobbes, not of Fichte and Renan, though it drops the Hobbesian accent on absolute statism. Hobbes understood the state as an instrument for the suppression of private violence;

liberal jurisprudence, in Bentham's and Mill's canonical treatments, turns this into the famous "harm principle"—the idea that the law's tolerance of exercises of all forms of personal liberty is defined in terms of the *rights* of another to be free from personal harm.[40] The hallmarks of liberal legality—the commitment to tolerance, the harm principle, and the discourse of rights—share a breathtaking abstractness. They are, to repeat, designed to maximize individual liberty *from* interference, not to rally the *Volk* toward any collective enterprise or goal. Indeed, from the liberal perspective, the idea of using the law as the tool to subtend individual freedom toward collective goals is precisely what liberal legality is designed to protect *against*.[41]

Finally, then, liberal legality does not presuppose any preexisting social solidarity. To the contrary, law *itself* creates the social solidarity that keeps the system of liberal legality in operation. Such social solidarity is based on precepts of tolerance and, in the Rawlsian iteration of liberalism, a willingness to agree on principles of social justice arrived at through a recursive thought experiment.[42] Needless to say, from the perspective of normative theories of nationhood, this is a particular *thin* version of social solidarity, and theorists from the left and right have questioned whether social solidarity so predicated is sufficiently robust to hold liberal legality together.[43] What remains important for present purposes is the idea that "law without nations" can be parsed as expressing a liberal ideal. Here law is free to promote its radically abstract agenda, an agenda that need not advance on the level of any specific nation-state; Kant remains most famously associated with this universalist aspects of liberal thought.[44] From the perspective of liberal legality, then, the term "nation" can happily fall out of the "nation-state" equation. The nation is a vestige, the entity that originally called the state into creation. But liberal legality contemplates the triumph of the state over the nation. Law itself comes to constitute the glue that holds the state together.

Overview of the Book

We have identified the concept of "law without nations" with three distinct vectors of inquiry. In the first, the "nation" was seen as but a shorthand for the concept of the "nation-state"; here "law without nations" asked us to imagine the consequences of the rise of international law and global legality for the

system of law organized around national frontiers and state institutions. This is the line of inquiry pursued in the first two chapters in this book. Both Jeremy Elkins and Karen Knop use the term "nation" and "state" interchangeably. For both, the word "nation-state" denotes something capacious, elastic, and varied. Neither of these scholars is in the first instance concerned with such questions as whether Canada or Belgium can be said to constitute a "nation-state" narrowly conceived. Instead, they are interested in exploring the jurisprudential relation of the nation-state to an increasingly globalized world. And both are interested in challenging what we earlier identified as a key assumption of much of the scholarship in this field—namely, that systems of domestic-national and international legality stand in a zero-sum relationship to each other.

In "Beyond 'Beyond the State': Rethinking Law and Globalization," Jeremy Elkins considers the legal relationship between the nation-state and a globalized world in two areas classically associated with the core performance of sovereign prerogatives: the punishment of crime and the waging of war. Nuremberg, as we recall, turned the waging of aggressive war into a crime and also pioneered the practice of empowering international courts to sanction violations of global norms. For Elkins this development cannot simply be understood as a shift in jurisprudential efficacy from the nation-state to the international court. On the contrary, Elkins insists that the rise of international criminal law and global norms has resulted in the enlargement and increased fluidity of *state* power. We can see this most directly, Elkins insists, in the application of principles such as universal jurisdiction, which authorizes a domestic-national court *anywhere on the planet* to try individuals accused of violating basic global norms, such as the proscription against genocide.[45] In the Pinochet affair, for example, Spain claimed the authority to try the former Chilean head of state for crimes committed against fellow Chileans. Spanish jurists went so far as to argue that amnesty agreements that insulated Pinochet from Chilean prosecution were not binding on Spanish courts.[46] This remarkable episode stands as a clear example of the projection of a paradigmatically internal legal power—the mounting of a criminal prosecution—across national borders into the world of foreign affairs.[47] Far from eclipsing the power of the nation-state, practices such as universal jurisdiction contemplate complex processes of interpenetration of one national legal system by another.

Elkins finds his second example in the Bush administration's "war on terror."

Here we find the obverse process at work. If the Pinochet affair represented the projection of a traditionally internal juridical power into external relations, the "war on terror" represents the introversion of a classically external sovereign act—the waging of war—into domestic practice. In developing this argument, Elkins avoids making the simplistic and misleading point that techniques of waging war have simply been turned against a domestic population. Rather, his point is subtler. Just as Nuremberg represented a critical moment in the juridification of war, the "war on terror" must be understood as *building on* this precedent, not dismantling it. In reinterpreting the meaning of the Torture statute, in pioneering categories such as "alien unlawful enemy combatant," in explicating the procedure to control trials before military commissions, the Bush administration showed that the juridification of war, far from placing brakes and limits upon the power of the nation-state, could in fact be enlisted to expand national, and especially executive, powers.

In "State Law without Its State," Karen Knop reaches a similar conclusion while examining very different material. Knop's focus is not on international law or norms per se. Rather, she is interested in the phenomenon of "disembedded state law"—that is, law that, once freed from its origins and moorings in a system of domestic-national legality, comes to experience an afterlife as foreign law. This phenomenon is perhaps most controversially associated with "comparative constitutionalism," or, in Knop's parlance, "transjudicialism"—the practice of, say, the U.S. Supreme Court citing the decisions of foreign domestic national courts in matters that don't directly implicate U.S. interests[48]—but the phenomenon is not limited to such practices. As Knop points out, we encounter disembedded state law less visibly but far more frequently in the fields of transnational public law and private international law. The latter field, also typically referred to as "conflict of laws," is particularly intriguing, as it requires a domestic national court not simply to interpret foreign law but also to apply and enforce it. This, Knop reminds us, is not simply an example of legal hybridity at work, in which legal norms from different systems come to meld. Instead, it is an example of a complex process of "lateral thinking" in which foreign courts are required to offer authoritative readings of the domestic law of a separate nation.

In conjuring a world defined increasingly in terms of a circulation and proliferation of legal meaning, Knop, like Elkins, reminds us of the insufficiency

of the zero-sum model. International law has not simply brought about a shift in locus of legality from nation-states toward international institutions. On the contrary, the rise of international legality has conferred new powers upon domestic national courts, while also creating novel legal synergies and new centers of legal authority. Both Elkins and Knop suggest that the rise of global legality, far from eroding the legal authority of domestic courts and the nation-state, has in fact contributed to the expansion of the state's legal domain and powers, making them more fluid and flexible. Their chapters offer a complex vision of legal change and contestation, of new powers but also of more fluid and permeable conceptual borders.

An appreciation of the insufficiencies of the zero-sum model and of the fluidity of legal domains also informs the chapters by Suzanne Last Stone and Margaret Kohn. The contributions of Stone and Cohen also address our second vector of inquiry—the classic normative theories of the nation. As we recall, these theories understood the nation as a foundational motive for the creation of states, but capable of existing prior to and independent from them. This problematic animates Stone's discussion, "Law without Nation? The Ongoing Jewish Discussion." Stone offers a conceptual history of Halakha, the elaborate body of Jewish law adumbrated in the wake of the destruction of the Second Temple.

As Stone points out, Halakha was specifically created in order to sustain a coherent notion of Jewish nationhood in the absence of the state. In Stone's words, Halakha created a "portable political entity": it defined and sustained a unified meaning of Jewishness among far-flung communities of the Diaspora. As such, Halakha presents a fascinating challenge to the traditional theories of nation and law. In the case of thinkers as diverse as Fichte, Renan, and Montesquieu, law reflected the spirit and values of the nation; in the case of Judaism of the Diaspora, however, law came to *define* the nation. This law, however, had the contradictory qualities of defining a specific nation—the Jews—in terms of its supranational and cosmopolitan character. The creation of the state of Israel, far from becoming the simple vehicle of Jewish nationhood, posed unusual challenges to the developed system of Halakha, a challenge that inverts not simply the views of thinkers like Renan but also the problematic addressed by our first two contributors. Elkins and Knop dealt with the problem of global and international law allegedly superseding the nation-state; Stone asks what

happens to a body of national/cosmopolitan law (Halakha) that now suddenly must accommodate the belated arrival of the state. How does one shoehorn cosmopolitan—albeit national—legal norms into the domestic legal system of a newly founded nation-state?

Stone makes clear that this question resists simple answers: within Israel, Halakha has been deployed by various groups in support of very different legal visions. For some, Halakha must now be understood as constituting a system of ethics within civil society that must defer to state law. Others interpret Halakha as a universal law that trumps and limits domestic law-making. Here we encounter, then, yet another challenge to the zero-sum model. In this case, cosmopolitan Jewish law, far from shifting power away from a domestic legal system, belatedly helps to constitute it. Finally, Stone's chapter problematizes normative theories of nationalism, which hold that only those nations that achieve statehood are capable of expressing their particular values and commitments through the law. In the case of Halakha, law sustained the nation in the absence of a state; the advent of statehood, far from solving the crisis of legality, in fact, creates it, as a surfeit of legality competes to define a coherent system of state law.

Magaret Kohn's chapter, "Western Imperialism and Islamic Law," complements Stone's contribution. Like Stone, Kohn provides a historical narrative of the development of an influential strand of religious law. According to Kohn, sharia, or Islamic law, had a long tradition of tolerating the secular rule of empires, principalities, and nation-states. During long periods, Islamic law functioned in a manner similar to Halakhic practice in Israel—that is, as a system of ethics controlling civil society. Only recently, Kohn observes, with the rise of radical Islam, do we find sharia transforming itself into a supranational system of legality. As such, sharia has turned into an oppositional force, presenting itself as an alternative to the Western nation-state, a model of statehood condemned with Islam as a product of Western imperialism; and as a challenge to the plural-liberal state, which remains predicated on the suppression of strong nationalist ideologies.

The rise of radical Islam thus presents its own important and conceptually rich challenge to the zero-sum model, one that offers an interesting counterpoint to Stone's study. In the case of Halakha, cosmopolitan legality must accommodate the belated arrival of the state; in the case of sharia, supranational legality comes to percolate up out of the void of failing states, constituting a

new vision of nationhood that is not state-centric but instead is based on a pan-national religious vision. The story of sharia thus reverses the chronology of Halakha. The latter must tailor cosmopolitanism to a late-arriving state; the former develops out of the system of extant states in the throes of deterioration. Yet in the case of both Halakha and sharia, we find law responsible for the creation of a powerful sense of nationhood. In both cases, it is not the state that is the engine of law-making, but the law that is the engine of nationhood without states.

The final chapters in this book, by Elazar Barkan and by Richard Shweder, both continue and extend this analysis in a manner that implicates our third vector of inquiry: states without nations. Above we associated this understanding with key tenets of legal liberalism and asked after the form of legality that such a system contemplated and perhaps necessitated. In "Ethnic Cleansing, Genocide, and Gross Violations of Human Rights: The State versus Humanitarian Law," Elazar Barkan draws attention to what at first blush appears to be a deeply anomalous phenomenon from the perspective of liberal law. Like the other contributors in our collection, Barkan is interested in examining the impact of the rise of international legality and cosmopolitan norms upon practices of state law. Like the other chapters in this volume, his discussion challenges the received wisdom of the zero-sum model.

Barkan's conclusion, however, is more radical than that of our other contributors. In studying the rise of norms of international humanitarianism in the past century, Barkan strikingly concludes that human rights law has done more than merely fail to place any meaningful brakes on practices such as ethnic cleansing and the forcible transfer of populations; it has, he insists, facilitated such practices. Not only has the growth of international law not eroded the strength of the nation-state and its sovereign prerogatives; to the contrary, it has provided the legal cover for nation-states to engage in the forcible transfer of vast population groups. International law, he insists, has been fully compatible with, and has assisted in, the project of ethnic cleansing.

On its face, this claim appears demonstrably false, contradicted by the tireless work of the international tribunals for Yugoslavia and Rwanda to punish the crimes of ethnic cleansing.[49] Yet Barkan insists that these examples are misleading. While it is true that international law in the wake of Nuremberg condemns such practices when accomplished by armed conflict, the same body

of law remains peculiarly quiet, indeed permissive, when population transfers proceed in peacetime.

In developing this argument, Barkan challenges a standard picture of liberal legality. Here he argues that the nation-state has best flourished under conditions of ethnic homogenization. Liberal theory, as we recall, conceives of the state not as an instrument of the nation, *das Volk*, but rather as an instrument of justice designed to protect the rights of the members of its plural groups. The solidarity that sustains the liberal state is constituted not by the thick ties of ethnicity but by the weak forces of law and the principles of tolerance that it both presupposes and enforces. Yet whatever the theoretical attractions of this model, Barkan indicates that liberal states have consistently reinvigorated themselves through practices of displacement and exclusion.

This, then, brings us to the final chapter, Richard Shweder's "Geertz's Challenge: Robust Cultural Pluralism in a Liberal Multinational Empire." Like our other contributors, Shweder explores the consequences of globalization on the nation-state. And like the others, he is concerned with demonstrating the insufficiencies of the zero-sum model. Yet, in contrast to others, Shweder's project is more explicitly predictive, as he tries to use history as a tool for hazarding what he identifies as "three auguries of globalization." Of these three, two by now should be quite familiar.

The first contemplates a future characterized by the rise of "universal civilization"; this imagining returns us to the notion of "law without nations" in the most obvious sense. This is the vision characteristic of the body of zero-sum scholarship that views the rise of cosmopolitan law as coming at the expense of the legal strength of the nation-state. The second possibility pushes in the opposite direction while also accepting the basic frame of the zero-sum model. In this imagining, the locus of legal efficacy, far from shifting toward cosmopolitan institutions and organizations, remains powerfully grounded in the nation-state. In this prediction, however, the state does not move toward the postnational ideal of liberal plurality; rather, it moves ever more in the direction of militant ethno-nationalism, a revival and recasting of the old vision of *das Volk*. In part, this is the vision that Barkan asks us to entertain, in his description of states purified by periodic acts of ethnic cleansing and population purges.

Shweder's third augury of globalization, however, is the most intriguing. With an eye cast back in time toward the successes and durability of the Ot-

toman Empire, Shweder asks us to imagine the possibility of such an imperial form—at once multinational and liberal—experiencing a future revival. Inasmuch as Shweder's project is predictive, he offers no normative justification of multinational liberal empires. But in placing this third augury at the conceptual and predictive center of his chapter, Shweder presents a picture of the future that attractively concludes the inquiry we hope to stimulate with this volume.

On one level, Shweder's third augury agrees with the other chapters in suggesting the insufficiencies of the zero-sum model. At a richer level, Shweder's augury connects with Stone's discussion of Halakha and Cohen's treatment of sharia. These latter chapters examine the complex manner in which national ideologies and religious belief can be shoehorned into and also percolate out of state forms. Shweder extends this analysis by imagining new institutional forms—at once imperial and liberal—arising out of this fraught interaction. In his view, empire may give rise to forms that are neither national-particularistic nor abstractly global; the rich particularism of competing *Völker* is neither aggressively ascendant nor sublimated into a thin liberal state. In identifying a locus of legal power and meaning that operates on a level between ethno-nationalism and universal civilization, Shweder's third augury offers a provocative concluding vision of "law without nations."

Prediction, of course, is an uncertain business. Ultimately the chapters in this volume are concerned less with musing on the future than in offering sharp analyses of the past and present. In their refusal to see the relationship between state and global forms in zero-sum terms, they extend the terms of prior debate and scholarly inquiry. And in their interrogation of received shibboleths and in the originality of their thinking, these contributions reconfigure our understanding of the fraught relationship between the nation and the state—and the legal forms and practices that they require, constitute, and violently contest.

Notes

1. Ernst Renan, "Qu-est-ce qu'une nation?" ("What Is a Nation?"), reprinted in Homi Bhabha, ed., *Nation and Narration* (London: Routledge, 1990), 8–22.

2. The classic definition of the state in terms of monopoly of force comes from Max Weber, "Politik als Beruf," in *Studienausgabe der Max-Weber-Gesamtausgabe Bd. 17* (Tübingen: J. C. B. Mohr, 1994).

3. Thomas Hobbes, *Leviathan* (London: Penguin, 1985).

4. Emile Durkheim, *The Division of Labor in Society* (New York: Free Press, 1997).

5. Hobbes, *Leviathan*, 196.

6. See, for example, D. Gauthier, *The Logic of "Leviathan": The Moral and Political Theory of Thomas Hobbes* (Oxford: Clarendon Press, 1969).

7. See, for example, C. Finkelstein, ed., *Hobbes on Law* (Aldershot: Ashgate, 2005).

8. Hobbes, *Leviathan*, 188.

9. See H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994); and Hans Kelsen, *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik* (Tübingen: Mohr Siebeck, 2008).

10. Hugo Grotius, *On the Law of War and Peace* (Whitefish, MT: Kessinger, 2004).

11. Karl Jaspers, *Wohin treibt die Bundesrepublik?* (Munich: Piper, 1988), 21.

12. Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (Boston: Little Brown, 1993).

13. See Christian Tumaschat, "The Legacy of Nuremberg," *Journal of International Criminal Justice* 4, no. 4 (2006): 830–44.

14. See Gideon Boas, *The Milosevic Trial: Lessons for the Conduct of Complex International Proceedings* (Cambridge: Cambridge University Press, 2007).

15. See Lawrence Douglas, "Shattering Nuremberg," *Harvard International Review*, fall 2008, http://www.harvardir.org/index.php?page=article&id=1651&p=.

16. See, for example, Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 2002).

17. See, for example, Wenhua Shan et al., eds., *Redefining Sovereignty in International Economic Law* (London: Hart, 2008).

18. See also Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2005).

19. See, for example, Ramesh Thakur and Peter Malcontent, eds., *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (New York: United Nations, 2004).

20. See, for example, Jeremy Rabkin, *Law without Nations? Why Constitutional Government Requires Sovereign States* (Princeton: Princeton University Press, 2005).

21. See Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules—From FDR's Atlantic Charter to George W. Bush's Illegal War* (New York: Viking, 2005).

22. See Alfred Aman, *The Democracy Deficit: Taming Globalization through Law Reform* (New York: New York University Press, 2004).

23. See, for example, Stephen J. Calabresi, *"A Shining City on the Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U.L. REV. 1335 (2006).

24. See, for example, Rabkin, *Law without Nations.*

25. Hugh Eakin, "The Jewish Company behind a German Slogan," *New York Times*, April 1, 2003.

26. See Cornelia Essner, *Die Nürnberger Gesetze oder Die Verwaltung des Rassenwahns 1933—1945* (Paderborn: Schöningh, 2002).

27. In 2000, Germany formally changed its law of citizenship, relaxing the principle of *Jus sanguinis* and moving toward a civic definition. Nonetheless, the concept of a hyphenated identity remains to this day largely foreign.

28. Johann Gottlieb Fichte, *Reden an die deustche Nation* (Hamburg: Meiner, 2008).

29. While some scholars have challenged the notion that Fichte offered an ethnic definition of nationhood, this position receives a strong defense in Arash Abizadeh, "Was Fichte an Ethnic Nationalist? On Cultural Nationalism and Its Double," *History of Political Thought* 26, no. 2 (Summer 2005).

30. Renan, "What Is a Nation?," 19.

31. Ibid., 19.

32. Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 2006).

33. Ibid., 7.

34. See, for example, Eric Hobsbawm and Terence Ranger, eds., *The Invention of Tradition* (Cambridge: Cambridge University Press, 1992).

35. Roger Cotterrell, "Law and Culture—Inside and beyond the Nation State," *Retfoerd: Nordisk Juridisk Tidsskrift* 31, no. 4 (2008): 23–36, 27.

36. Montesquieu, *The Spirit of the Laws* (Cambridge: Cambridge University Press, 1989).

37. "It goes without saying, that a foreigner, a guest, an alien-interloper, will view the law of the People/nation (*Volkes*) in which he finds himself as guest . . . exclusively in terms of security. He doesn't belong to the reality of the *Volkes* in which he lives." Carl Schmitt, quoted in Bernd Rüthers, *Entartetes Recht: Rechtlehren und Kronjuristen im Dritten Reich* (München: Deutscher Taschenbuch Verlag, 1994), 67 (author's translation).

38. See Hart, *The Concept of Law*.

39. See, for example, Joseph Raz, *The Authority of Law* (Oxford: Oxford University Press, 1983).

40. John Stuart Mill, *On Liberty and Other Writings* (Cambridge: Cambridge University Press, 1989).

41. See Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1990).

42. John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1972).

43. See, for example, Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1998).

44. See Immanuel Kant, *Grundlegung zur Metaphysik der Sitten* (Köln: Anaconda, 2008).

45. See, for example, Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford: Oxford University Press, 2004).

46. Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia: University of Pennsylvania Press, 2006).

47. The days of such an aggressive use of universal jurisdiction on Spanish courts, however, may be numbered. See Victoria Burnett, "Spain's Legislators Urge Curb on Rights Crimes Prosecutions" *New York Times,* May 21, 2009. Belgium, the first country to try to use universal jurisdiction aggressively, also has curbed the practice. See Human Rights Watch Report, "Universal Jurisdiction in Europe: The State of the Art," http://www.hrw.org/reports/2006/ij0606/6.htm.

48. Often cited in this regard are the decisions in *Roper v. Simmons*, 543 U.S. 551 (2005), which held the juvenile death penalty unconstitutional under the Eighth Amendment, and *Lawrence v. Texas*, 539 U.S. 558 (2003), which struck down a Texas antisodomy statute on due process grounds. Both decisions drew upon foreign and international materials.

49. See, for example, Guenael Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford University Press, 2006).