

REFLECTIONS ON A REVOLUTION
IN INTERNATIONAL LAW:

TRENDS AND THE SECOND BOUNCE OF THE BALL

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As managing editor of this issue of the *Journal Jurisprudence*, I have read, analyzed and edited the articles contained in the previous pages. In view of this, I thought that it would be useful to reflect upon, summarize and share my thoughts as I finish up the delightful duties of editing this issue. I write these reflections, not as a lawyer, but as a scholar-practitioner of conflict intervention who must grasp legal frameworks in order to effectively assist combatants or disputants in many of the places mentioned in the previous essays, such as Bosnia and the Middle East. As such, I have witnessed first-hand the ravages of unresolved protracted conflicts and war. Humans are capable of unimaginable horror against other people and so it is encouraging and enlightening to read these articles and see glimmers of hope that even in a highly complex world there may be a revolution of sorts where the outcome is the development of coordinated legal structures relating to crimes against humanity. In view of my personal experiences in these areas of the world, I agree with the main theme or assumption of this journal that there is no higher calling than the prevention of war. So, I share the following comments as my own personal and professional reactions to and reflection of these articles that you and I have just read.

Perhaps as an oversimplification, I would summarize this entire issue of the *Journal Jurisprudence* as a bold attempt to show the contested nature of multiple legal orders interacting in view of the revolutionary developments that occurred in international law during and after World War II; Professor Boudreau specifically articulates and discusses the modern “Law of Nations” as part of a newly emergent international fiduciary legal order. In this regard, Boudreau is fond of quoting his professor and mentor Michael Barkun’s words in his classic book *Law Without Sanction*: “[t]he world is not a one-law world, fervent wishes to the contrary notwithstanding; it is a world of ‘diverse’ public orders”.

Taking inspiration from Professor Barkun’s insight, Boudreau argues in his essay that there are actually three macro international legal orders interacting

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in a contested and sometimes complimentary way in international law today. These interactions of entire legal orders, consisting of the readily recognized public “state-centric” international law, private international law, and the newly emergent and evolving fiduciary international law, when taken together, constitute a highly dynamic pluralistic international legal order. Boudreau is correct to think these orders are constantly interacting, diffusing or even colliding into each other, resulting in constant legal contest on the macro and micro scale concerning what specific law will prevail.

Before going further, I should admit that I am a personal friend and close professional colleague of Professor Boudreau, who wrote the first essay “The Law of Nations and John Locke *Second Treatise*.” I am very familiar with his work in the area of conflict analysis and resolution, including his pioneering work on the epistemology of violent human conflict which begins, as he points out, with the elemental “epistemic encounter” between two human beings, or groups of human beings who seek to destroy each other’s existence. Based upon this epistemic framework, his subsequent work on “multiplex methodologies” and the “rehumanization” of those demonized and dehumanized in violent human conflict has made a valuable and unique contribution in our shared field of conflict analysis. I have worked with him on several pieces relating to the rehumanization of the enemy other and we have lamented the lack of legal institutions that can backup, so to speak, the framework where victims can go to assist them in restitution and, perhaps to some degree, recovery. Thus, his work in international law, his field of special interest and expertise, can be viewed as an elaboration of his earlier work in the field of violent human conflicts. His interest in the “Law of Nations” comes directly from his behind the scenes yet very real efforts to help the Bosnian people during the three years of the Balkans war (1992-1995). He even had former student in the office of Assistant Secretary of State Richard Holbrooke’s when, as Tom states, “they decided to unleash him” [Holbrooke]. Tom thought that Holbrooke — given his extraordinary combination of talents, intellect and iron will — would end the war in three months, and it was. Some would say the war ended just as Holbrooke wanted — like a bulldozer (Holbrooke) leveling the playing field.

In my judgment, Tom’s essay on the “Law of Nations” is a ground breaking, if not a revolutionary, contribution to the fields of international relations and international law; his essay occupies a unique intersection of historical and contemporary jurisprudence. His article argues, in essence, that the fiduciary international “Law of Nations” emerged from the “agony

and ashes” of World War II. Specifically, he first argued that the Allied nations made a series of solemn declarations and promises in good faith to the allied, conquered, colonized and neutral peoples of the world during World War II. Second, fiduciary obligations, duties and norms were created when the millions of the allied, conquered and colonized peoples of the world expressly or tacitly consented to these promises as seen by their subsequent service in helping to defeat global fascism. Third, that it is the preeminent role of present and future national or international judges, courts and tribunals to ascertain the extent (and nature) of these fiduciary obligations and duties accepted by governments, and made possible by their peoples subsequent service and sacrifices in order to win the war. I know that, to him, this seems self-evident and obvious due to the actual historical context and evidence that resulted from the Allies’ promissory declarations and individual statements made throughout the war. Yet, it is not admittedly self-evident to me at first, or probably to some of the readers of the journal. There have been plenty of promises and laws that have been made on the international stage during wars that have been subsequently broken. Yet, I now find his argument convincing, if not compelling and even unique.

I know that Professor Boudreau is not really convinced that scholars schooled in the current “hegemonic” state-centric international law paradigm accept his new paradigm and the resulting pluralistic complexity in international law or relations; thus the reaction will attempt to, understandably, reduce the fiduciary international legal order to existing legal frameworks of state centric law. Or, scholars and others may slip into stereotypical thinking and characterize his innovations in simplistic slogans, such as consisting of a “monist” world law, or applicable to only within “domestic jurisdictions” of states; many will likely deny that a fiduciary “Law of Nations” can exist, though Professor Boudreau eloquently argues that this is for current or future courts ultimately to decide.

Indeed, I think this article, this special issue, is written for the judges pondering the controlling law, each alone in his or her study, as these yet unnamed judges struggle with very real cases and individuals in their national or international jurisdictions. It is also written for citizens and legislators to ponder but I am more curious to know what judges, in the trenches, think of ideas expressed in this issue. Tom seems to think that the fully explicit international fiduciary legal order will be recognized first and foremost, by a globalized judiciary, with some accepting for now an international fiduciary legal order while others retreat into a seemingly safe, yet (if Boudreau is right) incomplete paradigm of international law. He has

cited to me in private conversations the section in which Thomas Kuhn⁷ believes, in the book the *Structure of Scientific Revolutions* that the “old guard” scholars will simply have to die out before the new is accepted. Until then, we have an interesting dynamic tension between pluralists and state-centric or sovereign rights schools of thought. Who knows what will happen but I suspect, within the next twenty to thirty years we will see a rigorous exchange, even mixing, of ideas, which is the way it should be. In this regard, Boudreau believes that, once you see an old problem from a new angle, then what was once thought to be only “X” can now become “XYZ” or even “WYC,” inspiring a new synthesis, and such a process may occur in the years ahead with the “Law of Nations.”

Indeed, I think that Professor Boudreau underestimates the ability of the now global academy of scholars to accept or even teach supposedly radical new ideas; admittedly, a state-centric international law or international relations is still very much with us— and typically serves us well; Yet, a fully explicit international fiduciary legal order based upon the global commons, the “Law of Nations” and even customary international law (which Tom mentions in his forthcoming book but not here) can be seen *as a natural evolution* of the existing state-centric paradigm, and not so hard to grasp or accept.

Finally, as someone who has travelled extensively through war zones across the globe, I have seen up close the vast human devastation caused by supposedly “limited” or “low intensity” war. I am thinking of my work in Nepal, Israel/West Bank and Bosnia where slow grinding conflict digs deep trenches between people. In view of these personal experiences, I fully support Tom’s call for individual accountability for initiating war (when warranted), and for any subsequent war crimes. In the absence, for now at least, of individual government’s willingness to observe the compelling norms of obligatory compliance with the international prohibitions against the initiation of war, the legal enforcement of individual accountability may be the best way in the short term to deter such wars from occurring in the first place.

Given this, I do not believe, as Tom does, that the war in Iraq was an unnecessary war of aggression and as such, the architects of this war in the Bush Administration, as one of the initiators of the invasion, should be prosecuted for war crimes. If what happened during the 17 month march to war was indeed a faux pretext for engagement then the leaders of several allied countries, along with several in Arab countries would all be held to account for reasons they believed, at the time, to be credible causes of

action. He and I both agree that Saddam Hussein was a despicable leader who, in essence, made war for decades upon his own people. Yet, he disagrees that the war was necessary and the last resort, while I believe that a renegade government headed by someone like Saddam Hussein was always a threat to international peace and security, as illustrated by his invasion in the early 1990s of his neighbors Kuwait and (less people forget) Saudi Arabia. More recently one might argue the same point about Muammar Gaddafi and the Obama Administration's participation in the military invasion in the Libyan civil war. He and I also personally and publically have supported the US troops engaged in combat in Iraq; Tom has even had one member of his extended family deployed there, so this is a position that he and I do not take lightly, and we have honorably agreed to disagree on some points regarding specific areas of engagement. Such disagreements should be expected, as Tom argues in the last section of his essay, in a world characterized by a diverse pluralistic international legal order. Differences are good and from them one would hope to find honest discourse and perhaps even the "third way."

The next four essays show, in fact, how the evolutionary attempts to apply fiduciary or new norms by the courts can be so contested and complex in a pluralistic international legal order that now characterizes the post-World War II international law. The contested nature of the new norms began immediately at the Nuremberg trials, and has continued to the present day; specifically, the contested nature of judicial decisions and application of the controlling law is illustrated first by Professor Tara Helfman's article: "Francis Biddle and the Nuremberg Legacy: Waking the Human Conscience." For the research of this article, Professor Helfman plunged into the historic Syracuse University Bird Library's Nuremberg and Francis Biddle Collection (Now found on file as well at http://library.syr.edu/digital/guides/b/biddle_f.htm, at the Library's Special Collections Research Center (SCRC)). Professor Helfman begins her paper by noting that her article shows that "the Members were acutely aware that the proceedings at Nuremberg represented an important pivot point in the history of international law, and that they managed the proceedings accordingly. Biddle knew that a great deal more was at stake at Nuremberg than the fate of the twenty-two Nazi defendants on trial. The future of international criminal law was also in the Tribunal's hands." Professor Helfman makes it quite clear that Nuremberg was a major game changer for international law and relations.

Professor Helfman then proceeds to describe the Judges' own thoughts and deliberations as they struggle with the momentous task set before them, as

well as specific legal dilemmas, such as: First, *what to do* with the Nazi warlords after all surviving members of Hitler's inner circle were captured; Second, was the Nuremberg Charter an exercise in *ex post facto* Law rendering its results suspect or even illegal? Professor Helfman goes over the competing considerations of policy, principle, and law to show how the first question was answered. The Allies eventually agreed on a trial rather than summary execution, partly due to the military considerations of pursuing a peaceful occupation of Germany without creating martyrs, and partly to place the Holocaust and other Nazi atrocities in the courtroom for the world to see.

Secondly, the Allies struggled with the sheer enormity of the Nazi crimes, especially the Germans genocidal assault against the Jews, the gypsies, the Poles and others deemed not fit to live in the "Third Reich". As Professor Helfman points out, at "the heart of the crimes to be confronted at Nuremberg was what Winston Churchill called 'a crime without a name.'¹ Rafaël Lemkin named it 'genocide.'" Professor Helfman notes how this question was directly if subtly dealt with by commentary submitted to the tribunal that, *ex post facto* law is a condition of domestic jurisdiction and that no such principle had yet been established by sovereign states in international law at the time of the trials. Until one was, this legal principle could not be considered as binding on sovereign states. Furthermore, and perhaps more importantly, one can't really criminalize on the international level what one — prior to the actual crime — *can't even conceived of being committed*, especially against an entire people as in the Nazi Holocaust. Yet, as Professor Helfman points out, the Nuremberg "Crimes against Humanity" is military criminal code and law 'writ large.' In view of this, there could be no doubt that these actions were wrong, and the magnitude of the 'crime without a name' — previous to the Nuremberg Charter — could not and should not go unpunished.

In other words, the fiduciary international legal order that Boudreau articulates and discusses was born in the caldron of contested and competing legal, historical and even military forces. There is no smooth and "yellow brick" road to the implementation of the Nuremberg and post Nuremberg principles of fiduciary international law. Every step of the way was, and will be, challenged and contested; Professor Helfman has dramatically shown in original and compelling research how the contested nature of the new international norms were argued in the Judges' Chambers even as the trial progressed. In fact, the Biddle papers are full of

¹ Quoted in William Schabas, *Genocide in International Law* (2000) 14.

conversations and even disagreements among the judges concerning the ultimate outcome of the trial. For Professor Boudreau, such judicial reflection, analysis and contested considerations are the very essence of law making, especially when a new fiduciary legal order is being born.

The next article by Juan Carlos Sainz-Borgo entitled “The International Criminal Court, Drug Trafficking and Crimes against Humanity” provides a local example of how these new norms of Nuremberg are “differentially diffusing,” as Professor Boudreau would claim, into domestic jurisdictions. Specifically, Professor Sainz-Borgo challenges the Venezuelan Supreme Court’s attempted recent incorporation of the Nuremberg criminal category of “Crimes against Humanity” into the domestic jurisdiction of Venezuela as an anti-drug trade provision. In a pluralistic legal order, there will be no simple solution, no one and proven way, to apply such international norms; each unique national jurisdiction will struggle, in view of its own legal and cultural history, with how to apply these norms. As Professor Sainz Borgo cites, even the unique geography of the Andes nations plays a significant role in how the court should interpret, incorporate and apply international norms. In this case, he concludes that the Supreme Court’s efforts to incorporate international norms such as the Nuremberg criminal category of “crimes against humanity” is misguided in relation to the Venezuelan drug trade and would cause more problems than it solves. I agree with his claim that “drug related crimes are certainly a worldwide scourge that may cause serious harm to the population. But it cannot be considered a crime against humanity, nor can it be subsumed under the competence of the International Criminal Court as part of the most serious and significant crimes, as defined by the international community.” In essence, there are limitations to the evolving “Law of Nations” as they encroach into domestic law not simply because of sovereignty issues but for the plain and simple explanation of lack of applicability.

The next article by Professor Berrnard Ntahiraja of Rwanda continues with this theme, and shows the difficulty of trying to apply the new post Nuremberg norms of “Responsibility to Protect.” (This is typically abbreviated as R2P or PTP, depending upon one’s legal culture.) The point of his paper is not to declare what the law definitely is. It is not to ‘adjudicate’ and say which of the theories is the right one. As he states, “[o]n contrary, it is to highlight the legal uncertainty characterizing the issue.” He first notes that the African states were developing such a doctrine well before its modern incarnation as a post 2004 World Summit declaration. In an interesting analysis of the post-World War II tension between the unilateral and collective legitimation of military force, Professor

Ntahiraja points out that, in lieu of UN Security Council action in a specific issue, regional organizations *can and should* authorize the use of military force as a last resort in cases requiring humanitarian intervention. He pointedly argues that the U.N. Security Council's inaction can cost lives, as Africa has learned in some very sad places in recent decades. So a major theme of his paper is to analyze enforcement action and the use of force from the perspective of the AU-UN relationship. As such, it is an invaluable addition to the rather slight attention often given in powerful capitals to regional arrangements and their potential role in maintaining international peace and security.

Professor Ntahiraja points out that, in the first instance, regional enforcement might be preferable and that: "the international community is more likely to tolerate a deviation from Article 53 where the regional arrangement has a unique connection usually based on geography to the subject of the action. Regional arrangements are understood to have a strong interest in addressing threats that originate within their own regions, and they often have the tools necessary to respond quickly and effectively. Therefore, it is acknowledged that regional arrangements may be better suited than the universal organs of the United Nations to address local threats to peace and security."

In the case of Libya, he seems to be arguing that the reverse occurred, stating that Security Council Resolution 1973 inadvertently "allowed" NATO to prevent the delegates of the African Union from seeking a peaceful resolution to the pending threat of a bloodbath by Gaddafi forces within the context of the UNSC resolution. Thus, he argues for a vigorous role in humanitarian interventions in the future for regional organizations; this could be a substitute strategy for those who want to see the Responsibility to Protect doctrine to fully mature in the future as a nonmilitary option before the Security Council finally throws down the gauntlet.

The next article by Professor Mihir Kanade, Director of the Human Rights Centre at the University of Peace, concerns the contested nature of merging trade and human rights regimes. First Professor Kanade notes that modern international human rights regimes are a direct outgrowth of World War II legal developments and innovations. He then cites the specific example of the WTO and argues that the implementation of human rights can occur, and even strengthen, within the context of the existing World Trade Organization; in particular, he points out that encouraging "sustainable development" is one of the goals in the Preamble of the founding "umbrella

agreements” of the WTO; at the same time, sustainable development has been identified by the United Nations General Assembly in recent years as an important human right independently of trade agreements. As such, he argues that these areas of overlap provide a common ground in which both human right norms and trade agreements can be linked and prove to be mutually beneficial, rather than polar opposites.

This article illustrates that, once again, the potentially contested nature of merging different legal norms and obligations, especially those that come from entirely different legal orders, can be complimentary and mutually supporting rather than simply “zero sum” and competitive processes. Thus, this example has important implications for judges seeking in the future to merge the norms of differing legal orders into a coherent and complementary whole.

FUTURE TRENDS: SHORT TERM V. LONG TERM

On the US legal front there are many examples of temporary fads (such as the prohibition of liquor) and current trends (gay marriage) to show that even in the law – the backbone of social order – we see development, experimentation, modification and elimination. When considering the development of laws that bind states via treaties it is quite easy to see how the current state system operates to make it happen.

The question being raised here is whether or not, in situations, events or activities focusing on human rights or crimes against humanity, if the unit of analysis – the “state” – is the appropriate measure or should the international legal order evolve to emphasize/experiment with the “nation” as well? This will be an admittedly difficult task to consider much less execute. Is this endeavor a merely temporary idea that will be absorbed into the current legal order or is it a trend that will fundamentally alter the existing legal paradigm and restructure some areas of international law? The answer will take time to develop but the evidence to date is that there is at least some movement in discussing this radical shift in thinking. The honest and, let us face facts, most alarming aspect of such an idea is the direct confrontation to existing state sovereign rights and constitutional limitations. Both concerns must be addressed if legal scholars are to ever have a decent chance of successfully building such a binding “Law of Nations”.

The question is, given this new paradigm presented by Professor Boudreau, how can it or will it develop in the future? Will it produce, at best, some minor modifications in the international legal order? Will it evolve into a

trend as national voices and especially the courts become more prominent? Will there be the predictable productive tensions or will this somehow evolve in a completely unique manner not contemplated by scholars? Who knows for certain but there are many questions to ponder some of which that go “over the horizon” and involve looking into future unknowns.

THE SECOND BOUNCE OF THE BALL

It is one thing to predict what the next evolutionary moves will be in the development of international law as it is being conceived of by Professor Boudreau’s “Law of Nations” construct. It is another thing altogether to seriously consider what potential paths and real obstacles may arise. There are several ways to examine what may lie ahead. First, we must consider obvious roadblocks and other challenges. Would the eventual and delicate balance between an evolving international legal structure pose a credible threat to member state sovereignty in that it might lead to the subjugation or weakening of domestic laws within participating states? Would a “Law of Nations” on such things as crimes against humanity supersede indigenous laws that, by treaty, would threaten a state’s ability to regulate its own citizens? What about constitutional restrictions or challenges? Would the development of a “Law of Nations” somehow backfire and provide the catalyst for rouge and despotic regimes to use it as a vehicle to oppress its own people? If so, will this lead to resistance from many quarters — from democratic countries to despotic regimes?

Second, we must examine the non-obvious and unintended consequences of a poorly thought out path that could arise during the evolution of the “Law of Nations”. Let’s take the worse case scenario of an inexperienced, theoretically focused and ideologically driven political leader who may be able to see that there may be some good that can come of such an order but who has no experience or clue, based in reality, on how to get it done. (Or, worse, he sees it as being a benefit to one group at the expense of another.) Now, putting motive aside, this situation has the potential to lead to serious yet non-obvious outcomes. If a “Law of Nations” is misunderstood then it could easily be ill-framed, perhaps using an outdated or discredited ideological lens, and this could mean the grounding of the law can lead to future problems. In other words, poor leadership, that ignores legal scholarship and precedent, has a tendency to propagate poor framing of issues that typically leads to more challenges. Likewise, failure to identify the non-obvious consequences and to properly frame the issues can lead to the growth of more ill advised paths that can produce more unintended

consequences. Caution and time are critical in the evolution of any complex social arrangement.

How can we identify potential non-obvious challenges? There are several methods but two are considered here. First, we could do this by considering several counterfactual experiments such as “what if FDR and Churchill did not develop the Atlantic Charter?” What would the world look like geopolitically today and how would that impact the development and functioning of a “Law of Nations”? Another question we could ask would be “what would the legal order look like today if the Allies decided to simply execute the Nazi leadership and not undertake the Nuremberg trials?” One might also consider the role of specific leaders such as “what if Hitler had not risen to power” and go from there. Counterfactual exercises force us to think of alternative historical paths and that allows us to recognize and appreciate what actually happened, what forces were in place and how the dynamics within that historical context led to the trajectory we are on today. Another related method is to focus on the future and play out as many possible scenarios imaginable and consider the range of outcomes. This might help in evolving the focus on the intended functioning of international law.

From this we can consider non-obvious and unintended consequences. Regardless of whatever the source of trouble is, be it poor leadership decisions, poorly written language or poor execution of the law, every effort has to be made to identify these potential roadblocks early and prevent them from becoming engrained in the evolution process. Here, remarkably, we can take lessons from people who live and work in the private sector. Regardless of how one views members of the business world they do provide several creative and entrepreneurial means of solving old problems with new ideas that can be instructive to this discussion. Creative thinking requires us to look for the non-obvious and, if possible, takes advantage of it. Social evolution is predicated on creative thinking and, I argue, the entrepreneurial spirit. Indeed, much of the success of conflict intervention and the resolution of protracted conflicts comes, regardless of whether one wants to make the connection or not, from a business mindset of meeting needs. There is no reason why this entrepreneurial spirit can't be employed in the evolution of law.

Finally, if all goes well, and there comes a time for a version of the “Law of Nations” then we have to consider the “second bounce of the ball.” What, you might ask, is this? It is another way to say that we must examine not just long term consequences but, more importantly, the idea that there is an

over the horizon second-generation method of thinking. For instance, back in the late 1970s and early 1980s, as baby boomers were just beginning to enter middle age, the United States experienced a health craze that social institutions just weren't prepared to effectively manage. Those that saw this coming typically "cashed in" on the "first bounce of the ball" by opening gyms, health food stores and fitness clubs. That's fine as they were directly and effectively meeting a pressing social need. Now, if we go one step further in this trajectory it is clear that few thought to ask: "what next?" After all these people got into shape what else would they need as they aged? My point is that very few have anticipated the aging cycle of the baby boomers, who by now seem to be discovering their own mortality as though this is occurring for the first time in human history. They didn't really anticipate the second bounce. Ideally, the evolution in international law won't make the same mistake.

The whole notion of the "second bounce of the ball" requires one to think through the entire trajectory – over the horizon – to identify the unthinkable, unforeseen, unexpected, i.e. the fuel from which opportunities arise, and to develop a plan now on how to steer the trajectory to prevent a collision with problems or, if that will inevitably occur, find potential remedies before it happens so that the evolution or development plan can continue on course. If there is to be a real evolution – a paradigm shift that replaces the "old problem solving methods" with new, innovative or novel methods – then there must also be an accompanying focus on second-generation thinking and outcomes.

As a word of caution we must realize that sometimes great ideas flounder in the laboratory because the inventor doesn't know how to get the product to market or conversely the leader with a great idea fails because he or she gets too far out in front of his or her people and they are unable to see the path and outcome and thus refuse to follow. In the case of a "Law of Nations" we see a large, complex, slow moving and new paradigm that can be adequately framed and addressed but only if the political will allows it, the legal scholars embrace it and, more importantly, nations reject the notion of placing value only on the immediate moment, or the next six months or so. If nations and their courts internalize the idea and psychologically accept it as their own trajectory and act as the trendsetters, we may see a new and unexpected international law evolve in the future.