

**THE LAW OF NATIONS AND JOHN LOCKE'S *SECOND*
TREATISE: THE EMERGENCE OF THE FIDUCIARY LEGAL
ORDER DURING WORLD WAR II**

THOMAS BOUDREAU PH.D.*

**SENIOR RESEARCH FELLOW
INSTITUTE FOR RESOURCE AND SECURITY STUDIES
CAMBRIDGE, MA 02139**

**PROFESSOR
CONFLICT ANALYSIS AND RESOLUTION
SALISBURY UNIVERSITY
SALISBURY MD 21801**

Summary:

The following essay argues that the promissory legal obligations, norms and duties articulated in good faith by the Allied powers during the agony of World War II created a Law of Nations consisting of common rights and protections for individuals and nations that are the legal preconditions for legitimate state authority and its subsequent exercise of power or force. This Law of Nations make fully explicit the traditional fiduciary international legal order that governs the global commons, making it part of a robust and interacting pluralistic international legal order that now characterizes international law.

ACKNOWLEDGEMENTS:

I want to thank Prof. Jose Alvarez, Prof. Michael Barkun, Prof. David Bennett, Michael Bersani Esq., Prof. Daniel Deudney, Dean Louis Goodman, Prof. Tara Helfman, Mr. Spencer Henderson, Prof. Joseph Julian, Michael Kearney Esq., Prof. Ralph Ketcham, Dean Robin Paul Malloy, Frank Panopoulos Esq., Mr. Giandomenenico Picco, Dr Aron Ping D'Sousa, Prof. Brian Polkinghorn, Ms. Susan Rojas, Prof. Richard "Red" Schwartz, Prof. William Slomanson, Mark Thibodeau Esq., as well as Daniel Chou a gifted student from the University of Pennsylvania and other friends for reading earlier versions of this draft. I especially want to thank Gordon Thompson, Ph.D., Director of the Institute of Resource and Security Studies (IRSS) for

* © Copyrighted, 2011, By Thomas Boudreau, All Rights reserved.

his continuous support and help over the years. Parts of this article are reprinted with permission from: *International Perspectives*, spring 1994, vol. 5, No. 2 and *The Digest*, (forthcoming, 2012) both published by the Syracuse University College of Law. The responsibility for the ideas and possible mistakes in the following essay are of course my own.

PREFACE:

This is a WORK OF HISTORICALLY BASED JURISPRUDENCE concerning the actual origins during and immediately after World War II of the modern Law of Nations that protects the basic "property" of peoples; in this regard, it is important to remember that Locke, in his *Second Treatise of Government*, defines "property" as a people's lives and liberties as well as possessions. Since the Law of Nations is a law of peoples, I am in debt to Locke's *Second Treatise* for providing the classical example of the fiduciary role that governments can play as a trustee of the rights of peoples throughout the world.

DEDICATED:

To Dean Guthrie Birkhead,⁺ combat veteran in Patton's Third Army in the European Theater (and was my boss in graduate school); to Prof. Fred Goldie, an Australian Paratrooper (and, later, my Ph.D. dissertation advisor) who served in the Pacific Theater in World War II; to Mr. Don McCandless, combat decorated Marine in the Pacific Theater including Iwo Jima and later Quaker Elder of Sandy Springs Meeting in Maryland; and to Col. David Sterling, Eighth Army in North Africa, a legend in all Allied Armies, and to the countless others of their generation in American or Allied uniform who made the Law of Nations possible through their service and sacrifice.

**INTRODUCTION AND SUMMARY:
ORIGINS OF A MODERN LAW OF NATIONS**

The operating axiom of this paper is that a new Law of Nations was created in international law due to the solemn promises made in good faith by the Allied powers during World War II to their own, neutral, conquered and colonial peoples of the world. Specifically, this New Law of Nations emerged out of the Atlantic Charter, the Declaration of [the] United Nations on January 1, 1942, the Moscow Declaration and other promissory statements made by Allied governments especially during the darkest times of the war. These declarations contained solemn promises that, in essence,

⁺ In Alphabetical Order.

created fiduciary obligations, duties, interests, and norms that were to be recognized on the international level by governments and enjoyed by the peoples of the world if the war was won.

This fiduciary Law of Nations now governs the relationship of governments to their own and other peoples and enunciates the rights of such nations to, among other things, human rights, self-determination, trusteeship and collective security as embodied in the Charter of the United Nations and other post war documents. In particular, the modern Law of Nations limits and sharply curtails the unilateral violence that a government can legitimately use against its own or other peoples as the Nuremberg Charter, the Convention on the Crime and Punishment of Genocide and other subsequent legal conventions attest. By doing so, the emergence of the Law of Nations resulted in a fundamental realignment of the legal relationship between the nation and the state, terms that are usually conflated in the legal lexicon.

Specifically, the new Law of Nations reconfigures the legal relationship between the nation and state by recognizing the *international rights* of the people within the state and, in the case of Nuremberg Charter, the rights of the nation *against the state*. These legal innovations result in a profound shift in the fundamental and historically competing sources of legitimacy and sovereignty away from the state to the nation or people of the polity who are now the new *imperium et imperii* (sovereign within the sovereign) in international law.

Before World War II, the legal meaning of the “nation-state” was nearly always conflated into the legal definition of the “state.” Yet, during and after the war, this simplistic shorthand for the “nation” no longer became accurate—though the two terms are continually used up to current times without critical reflection or review. Such linguistic and legal conflation simply doesn’t do justice to the manifold promises made by the Allied governments to entire peoples during the war. In short, the “nations” of the world took on extraordinary significance during World War II as the Allied governments made solemn promises in good faith to peoples throughout the globe in an ongoing attempt to mobilize the millions needed to defeat the Axis powers. These steps included the making of promissory declarations to millions of people under European colonial control in an effort to gain their supreme allegiance or, at least, not support the Axis side. The future fiduciary acts promised by the Allied governments included their promises to observe human rights, self determination, systems of

trusteeship and collective security when and if the peoples of the world helped win the war.

This not to claim that the development of the Law of Nations in the crucible of World War II was a deliberate war aim; on the contrary, it evolved as a result of complex, contested and often convoluted interactions, interests or compromises among the Allied powers fighting the war, some of whom had vast colonial holdings overseas and wanted to preserve these after the war, and those that detested colonialism, especially the Americans or Soviets; specifically, the American government under Roosevelt wanted the termination of world-wide colonialism as one of the clear war aims to rally the conquered, colonial, neutral and allied peoples of the world to the anti-Axis coalition or, at the very least, not join the Axis cause at a time of mortal danger to the Allied nations.

These fiduciary rights make fully explicit an often implicit international fiduciary legal order that has traditionally existed consisting of norms, duties, customs and territories held *in common* by humanity. This traditional fiduciary legal order consists of the oceans and the “freedom of the seas” as illustrated in the Law of the Sea Convention, as well as other global commons. As we shall see, United Nations General Assembly can monitor and maintain the global commons, beginning with the Earth Atmosphere, for future generations; this has important implications for trying to address global climate change. With the advent of these post World War II fiduciary norms, duties, relationships and interests, such as the observance of international human rights, this fiduciary legal order becomes more robust and fully explicit though still inevitably contested in international and national jurisdictions. *So, it is ultimately the role of present and future judges in national jurisdictions, international tribunals and the International Court of Justice (ICJ) to decide the scope and extent of this still emerging fiduciary international legal order.* The Pinochet indictment in Spain by the great and courageous Judge Baltasar Garzon is a prominent, if not pioneering, example of this ongoing evolution in fiduciary international law that, as we shall see, has its roots in legal developments during and after the greatest war in human history.

This argument concerning the historical founding of an expanded *international* fiduciary legal order during World War II parallels the theoretical argument made by John Locke concerning the founding of government in the domestic sphere. In his classic *Second Treatise of Government*, Locke argues that, after the people set up a civil society through a social contract, they then proceed to create a government as a trust to protect the people’s rights. In Locke’s scenario, governments are created

simply to serve as trustees while the people are the true trustors *as well as* beneficiaries of this limited and fiduciary governmental power. As Prof. William Ebenstein of Princeton University points out, the principal characteristic of a Lockean trust is that the government assumes primarily obligations rather than rights. Ebenstein states that Locke, by claiming that government represents a fiduciary pact, enunciates a sharp distinction between the state and society.

For Locke, the society is far more important and enduring while the government represents simply a trusteeship that results from the limited fiduciary interests granted to it by the people. Of course, Locke theory on the formation of government has significant historical import. As Prof. Ebenstein notes, by “committing themselves to Locke’s theories of government the British supplied the case for the American Revolution and for the later—peaceful—*independence of other colonies and India.*”

In the following essay, I will argue that Locke’s argument found in his *Second Treatise* concerning the creation of government as a trustee on the domestic plane helps to explain by analogy the origins and evolution of an international fiduciary legal order out of the agony and ashes of World War II; specifically, in the following pages, I will argue four key points concerning the creation of a fiduciary Law of Nations during the war. First, as we shall see, governments made solemn declarations and promises to their own and other peoples concerning self-determination, human rights, trusteeship and collective security that would be recognized and respected -- by these promissory governments -- *when and if the war was won.*

Since many hundreds of thousands of soldiers were going to die to fulfill these solemn promises and pledges, these government declarations can’t simply be characterized as mere propaganda on the one hand, or simple contractual statements between the living on the other. Instead, I will argue in the following essay that these solemn pledges were made in good faith to the allied, colonial, conquered and neutral nations of the world, creating fiduciary rights, duties, norms and interests to be exercised and enjoyed by *these peoples as a whole* -- if they first helped to win the war. In short, the nation or people became the *trustees* and *beneficiaries* of these fiduciary norms. As we shall see, this is precisely how Locke envisions the relationship of the government as a *trustee* of the people or society’s rights; for Locke, this relationship exists only within the context of an enduring trust.

These wartime promises, made and accepted in good faith, helped to mobilize the millions of people necessary to fight and defeat the mortal

threat of global fascism. In essence, using Locke's theoretical framework (as an analogy) to describe actual historical events, the governments making these promises during the war became, in effect, the trustors of this new fiduciary legal order which includes their recognition of self determination, international human rights and strict limits on the state's use of international force.

Hence, this type of fiduciary pact is essentially below, or more accurately, begins below the threshold of traditional interstate treaties. The original promises and solemn declarations of the Allied powers made in the early desperate days of World War II often resulted in eventual treaties after the war was won, and thus often became, like the Charter of the United Nations, hybrid agreements consisting of both state-centric or treaty and trust law. Yet, the origins of the trusteeship relationship forged in the crucible of world war began *within the state, as a matter between the mortally threatened government and its own and other peoples*. As such, the resulting trust—often consisting of contested fiduciary rights, interests and relationships, such as human rights—are or should be self-executing *within* the nation's own nation and judiciary. This is especially a contested issue currently in the United States, despite its being one of the prime architects of the new post-war legal order.

Second, this fiduciary Law of Nations is republican in scope (in that it ultimately seeks to end, or legally limit the traditional prerogatives and predations of states in the Westphalian system prior to World War II. As Prof. Daniel Deudney points out in his award winning book, *Bounding Power*, republican security theory has been concerned since ancient times with the constraint and limitations on unilateral political or military force. As such, republican security theory is useful in understanding the systems of restraints that resulted from World War II. The resulting regimes of human rights, Nuremberg and the Charter's *outlawing of aggressive war can be viewed as legal systems of restraint* upon the once unfettered power of the state. In particular, under the Law of Nations, individuals can and must be held accountable for war crimes, crimes against peace and crimes against humanity. In particular, under this fiduciary legal order, national jurisdictions have the responsibility to prosecute war criminals from their own and other nations.

Such individual accountability for the commission of international crimes is a conceptual and legal anomaly in traditional public international law defined largely in terms of relations between states. Yet, in the emergent Law of Nations, the critical importance and World War II innovation of

holding individuals internationally accountable for their crimes of state is fully consistent with a fiduciary legal order that recognizes both individual human rights as well as group rights, such as the rights of a people to self-determination. We will explore the profound significance of the modern Law of Nations in terms of creating further republican restraints upon the state once unilateral prerogatives and power, especially to wage war, in a later section of this essay.

Third, this Law of Nations forged out of the efforts to win World War II is simply the most recent addition to the traditional fiduciary international legal order that has arguably existed since the time of Grotius and governs, among other things, the freedom of the seas and the global commons. (The legal reality of the global commons is also hotly contested by a small minority of states; yet, their claims are not recognized by the vast majority of governments throughout the world.) The fiduciary norms, interests, duties and relationships resulting from World War II are the newest elements in this traditional body of international trust law, which has traditionally been largely a recessed *legal order* within international affairs. With the advent of the post World War II Law of Nations, this recessed (and thus often taken for granted) fiduciary order has become more fully developed and explicit in international law, though its certainly capable of further development and evolution in the future.

In particular, the Charter of the United Nations will be described as a hybrid document consisting of treaty and trust law. In fact, due to the policies and priorities of the Roosevelt Administration, legal trusteeship is central to the fiduciary foundations of the Charter. As we shall see, this has implications concerning ongoing international efforts to combat global climate change by monitoring and maintaining the Earth's atmosphere and oceans, preserving them for future generations.

Fourth, this new Law of Nations, as part of the fiduciary legal order compliments, co-exists and often contests the two other traditional legal order recognized in international law—public international law, which will be defined and largely limited in the following essay to treaties between states, and private international law. In short, there are at least three major international legal orders that constantly interact and diffuse into each other, causing (or will cause) contested as well as complimentary judicial decisions throughout the world. (See Figure 1, below, Section IV) Hence, the new Law of Nations is part and parcel of the differing legal orders that constitute the newly emergent field of global legal pluralism. This has important

implications for how courts interpret and apply the Law of Nations as part of the fiduciary heritage of humanity.

PART I: PROMISES MADE: THE SOURCES OF THE MODERN LAW OF NATIONS

Because of the unprecedented scale of violence, suffering and death experienced by human beings in World War II, the victorious nations of the world agreed, even as the war was being waged and in the war's immediate aftermath, upon a series of declarations, treaties, and trials that literally transformed the very nature of international legal jurisprudence. The unmitigated violence of the Nazis against the Jews, involving the horrors of the Holocaust, as well as the terror directed against other European, Slavic, and Soviet peoples was simply unparalleled in human history. On the other side of the globe, the slaughter and exploitation of the Chinese, Vietnamese, Korean, and Pacific peoples added millions more to the war's toll¹.

Because of these terrible realities, a unique *corpus juris* or body of law was created in good faith to ensure, as far as possible, that the massive war against subject human populations—including a state's own as well as others—would never happen again. Developed during and immediately after World War II, this *corpus juris* consists of: 1) the Atlantic Charter, the Declaration of [the] United Nations and subsequent wartime or summit declarations by the western allies;² 2) the United Nations Charter;³ 3) the Charter of the International Military Tribunal, hereafter referred to as the

1 See PETER LONGERICH, HOLOCAUST: THE NAZI PERSECUTION AND MURDER OF THE JEWS. (Oxford Univ. Press Inc. 2010); see also GERHARD L. WEINBERG, A WORLD AT ARMS: A GLOBAL HISTORY OF WORLD WAR II 894-921 (Cambridge Univ. Press 2d ed. 2005) (the last chapter of this excellent book is on the "cost and impact" of the war).

2 See, for example, Declaration of Principles, known and cited hereafter as the Atlantic Charter, by the President of the United States and the Prime Minister of the United Kingdom, August 14, 1941 [hereinafter Atlantic Charter] available at http://www.nato.int/cps/en/natolive/official_texts_16912.htm; see also THE ATLANTIC CHARTER (Douglas Brinkley & David R. Facey-Crowther eds., St. Martin's Press 1994); Also see: Declaration of United Nations, 6 Dep't State Bull. 3, 3-4 (1942). 1 January 1942.

3 See LELAND M. GOODRICH & EDWARD HAMBRO, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS (World Peace Found. 2d ed. 1949); JOSE E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS, (Oxford Univ. Press 2005) see also Charter of the United Nations [hereinafter U.N. Charter] available at <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf>.

Nuremberg Charter, and the subsequent Nuremberg trials;⁴ 4) the Universal Declaration of Human Rights which contributed to the subsequent post-war explosion in international human rights law;⁵ 5) the Convention on the Prevention and Punishment of the Crime of Genocide (1948);⁶ 6) the 1949 Geneva Conventions and the systematic elaboration of humanitarian law;⁷

4 See Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544 [hereinafter Nuremberg Charter] available at <http://avalon.law.yale.edu/imt/imtconst.asp>; Judgement of the International Military Tribunal, Oct. 1, 1946 available at <http://avalon.law.yale.edu/imt/judgen.asp>. See also Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38 (1947). [*The Law of the Nuremberg Trial. The American Journal of International Law*](#), Vol. 41, No. 1 (Jan., 1947), pp. 38-72. Also on line at: Published by: American Society of International Law. Stable URL: <http://www.jstor.org/stable/2193853>. BRADLEY SMITH, REACHING JUDGEMENT AT NURMEBERG: The Untold Story of How the Nazi War Criminals were Judged. (Basic Books, 1977) Smith used the extensive Nuremberg Collection in the archival library at my *alma mater*, Syracuse University (SU), to research his book; I began using these archives, based upon the American judge Francis Biddle's personal diary and collection, at SU as a graduate student in the early 1980s , and have been using them ever since to understand the thinking behind events and the actual trial of the Nazi warlords.

5 See Universal Declaration of Human Rights, G.A. Res. 217A at 71, U.N. GAOR, 3d Sess, 1st plen.mtg., U.N. DOC A/810 (Dec. 12, 1948); see also: JOHANNES MORSINK. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS ORIGINS, DRAFTING AND INTENT (Bert B. Lockwood, Jr., ed., Univ. of Pa. Press 1999); see also WILLIAM R. SLOMANSON, FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW (Wadsworth Publ'g Co. 6th ed. 2010) (1990) which provides an excellent overview and analysis concerning the evolution of human rights law since World War II.

6 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) available at <http://www.hrweb.org/legal/genocide.html>; see also JOHN COOPER, RAPHAEL LEMKIN AND THE GENOCIDE CONVENTION (Palgrave Macmillan 2008). HERBERT HIRSCH, GENOCIDE AND THE POLITICS OF MEMORY. Chapel Hill: University of North Caroline Press, 1995). Finally, see: IRVING LOUIS HOROWITZ, GENOCIDE: STATE POWER AND MASS MURDER (Transaction Books, 1976). Raphael Lemkin is a hero of humanity; the Genocide Convention is largely the result of his life long efforts to outlaw mass killings, an effort he began as a Polish lawyer under the League of Nations; he finally succeeded in 1948 at the United Nations though unbelievably, in a terrible and cruel irony, much of his own family perished in the Holocaust during World War II. He worked for the American government during World War II and at Nuremberg to account for Nazi war crimes. In tribute, I devote almost an entire chapter to this remarkable man in my forthcoming book, *Law of Nations, Legal Order in a Violent World*.

7 The Geneva Convention of 1949 and the two 1977 additional protocols are often referred to as the "Geneva Conventions," or as the "Law of Geneva." This now consists of the following: The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; (entered into force Oct. 21, 1950) available at <http://www.umn.edu/humanrts/instree/y1gacws.htm>; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) available at

and 7) the *Reparations* Case which recognized the international personality of entities other than states, such as an international organization.⁸ Subsequent to these developments is the gradual evolution of *erga omnes* obligations⁹ and the International Bill of Human Rights.¹⁰ As Prof Louis Henkin of Columbia observes, the modern human rights movement is an important development of the “various articulations of the war aims of the Allies in World War II”.¹¹

As we shall see, the three Charters—the Atlantic, the United Nations as well as the Nuremberg—and their related declarations or documents were critical factors in establishing the fiduciary foundations of the new international legal order.

This is because, beginning with the Atlantic Charter, and the Declaration by [the] United Nations, January 1 1942, the Allied wartime declarations contained specific *promises and commitments* by the Allied powers which created, as we shall argue below, a *fiducia* meaning a “pledge” in Latin or (later) a trust between the promissory government and its own people or nation, as well as with other peoples in the world. These promissory declarations, in essence, created legally binding *fiduciary duties, interests or relationships* between the mortally threatened governments and the peoples or nations that they were trying to influence around the world.

<http://www.icrc.org/ihl.nsf/full/370?opendocument>; see also Protocols I and II Additional to the Geneva Conventions of August 1949, June 8, 1977 (entered into force July 12, 1978).

8 1949 ICJ 174, *Reparations for Injuries Suffered in the Service of the United Nations*, International Court of Justice Advisory opinion, 1949. This ICJ recognized that entities besides states had standing under international law to bring claims against a state.

9 See MAURIZIO RAGASZZI, *THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES* (Oxford U Press, 2000). Also see M. Cherif Bassiouni, 1998. *International Crimes: Jus Cogens and Obligatio Erga Omnes*, *Law and Contemporary Problems*, 59: 63-74. The concept of *Jus Cogens* predates World War II, yet events during the war gave it added urgency, even though it still suffers from legal imprecision. See: CHRISTOS L. ROZAKIS, *THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES*, (North-Holland Publ'g 1976); see also Carin Kahgan, *Jus Cogens and the Inherent Right of Self Defense*, 3 ILSA J. INT'L & COMP. L. 767 (1997). Finally see: Vienna Convention on the Law of Treaties, May 22, 1969, U.N. Doc. A/CONF 39/27.

10 William Slomanson, *supra*, note 5. The first time that I heard this term was while reading the first version of Slomanson's text. I am in debt to Bill and his work. This preceding list is taken from my article: Thomas Boudreau, *Jus Gentium and Systematic Legal Order: New Paradigm for International Law*, 5 INT'L PERSP. (1994). Published at Syracuse University College of Law.

11 LOUIS HENKIN, *The International Bill of Rights: the Covenant on Civil and Political Rights*, (New York: Columbia University Press, 1981).

The legal definition of the nation, unlike that of the state, has always been problematic and underdeveloped in international law.¹² For our purposes, the nation here is legally defined as a *jural community* consisting of a distinctive people, some or most of whom occupy a specific territory, who *shares a sense of moral and legal obligation* towards one another; as Michael Barkun explains in his book *Law Without Sanction*, the concept of “jural community” means the “widest grouping within which there are a moral [or legal] obligation and a means of ultimately to settle disputes peacefully”¹³. In this sense, the nation as a jural community exists as a legal pact and an ongoing normative narrative even between the dead, the living and the unborn since it can keep legal obligations, such as public or private trusts, between preceding, present and pending generations. According to Prof. Barkun, such jural communities can be found in so called “primitive” societies as well as in international law. As we shall see, because of legal developments during World War II, such nations had rights recognized prior to statehood, such as self-determination, and even against their own governments, as embodied in the Nuremberg Charter.

In short, the nations of the world took on extraordinary significance during World War II as the Allied governments made solemn promises to peoples throughout the globe in an ongoing attempt to mobilize the millions needed to defeat the Axis powers. These steps included the making of promissory declarations to millions of people in an effort to gain their supreme allegiance or, at least, not support the Axis side.

Yet, in the early years of the conflict, especially during the summer of 1941, the Axis powers seemed to be winning the war.¹⁴ The German Colossus stretched from Norway and the North Sea through Europe and Greece to

12 For instance, Rawls addressed this problem in his book; see JOHN RAWLS. *THE LAWS OF PEOPLES*. (Harvard Univ Press 3d ed. 2000) (providing a non-historically based call for a law of the people). See also *INTERNATIONAL LAW AND THE RISE OF NATIONS: THE STATE SYSTEM AND THE CHALLENGE OF ETHNIC GROUPS* (Robert J. Beck & Thomas Ambrosio eds., 2002); J. Samuel Barkin & Bruce Cronin, *The State of the Nation: Changing Norms and Rules of Sovereignty in International Relations*, 48 INT'L ORG. 107 (1994). There are, of course, volumes written about what constitutes a nation; I am offering a legal definition here that will be inevitably contested; yet, I point out that this definition, inspired by the work of Prof. Barkun, can be empirically measured and tested.

13 MICHAEL BARKUN, *LAW WITHOUT SANCTION: ORDER IN PRIMITIVE SOCIETIES AND THE WORLD COMMUNITY*. Yale Univ. Press. (1968). Prof. Barkun has been an invaluable teacher, and colleague.

14 WEINBURG, *supra* note 1; see WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY* (Simon & Schuster 3d ed. 1990).

the Mediterranean and North Africa. Hitler had just attacked the Soviet Union and few observers thought at the time that the Russians could stand up to the Nazi onslaught¹⁵. On the other side of the globe, the Japanese had over a million men in China and seemed intent on carving out its “Co-Prosperity Zone” without any serious opposition¹⁶.

In particular, there seemed nothing that could--or would prevent the possible linkup of German and Japanese forces along the rim of the Indian Ocean, especially in 1940 till early June, 1942. Such a linkup would enormously complicate the Allies capacity to win the war over their mortal enemies.

So, the outcome of the war was very much in doubt in the early 1940s when the Allies began to make promissory declarations to their own and other peoples involving the international recognition of human rights, self-determination and collective security to protect the ensuing peace, if they first won the war.

THE FIRST PROMISES: THE ATLANTIC CHARTER

The very first, and one of the most important documents in this regard, the Atlantic Charter, makes it clear that the promises made by the governments of the United States and the United Kingdom were to the “peoples” or “nations” of the world. The choice of wording was deliberate; for instance, during the Atlantic Charter Conference in 1941, Roosevelt told Churchill that “the peace cannot include any continued despotism. *The structure of the peace demands and will get equality of peoples*” (Emphasis added.)¹⁷ Roosevelt meant colonies as well as countries and he never backed down from this position which had the strong support from his civilian administration and military leadership. Accordingly, the Atlantic Charter mentions “peoples” or “nations” eight times while it mentions the word “states” only once.

The Atlantic Charter was the culminating statement made by President Roosevelt and Prime Minister Churchill at their first meeting in Placentia

15 In the early years of the war, the British were, in particular, skeptical of the Soviet ability to hold out. See: ELLIOT ROOSEVELT, AS HE SAW IT. (Greenwood Press. 1974).

16 GADDIS SMITH, AMERICAN DIPLOMACY DURING THE SECOND WORLD WAR 1941-1945. (Newbery Award Records 2d ed. 1985).

17 AMERICAN POLITICAL THOUGHT: THE PHILOSOPHIC DIMENSION OF AMERICAN STATESMANSHIP (Morton J. Frisch & Richard G. Stevens eds., Transaction Publishers 3d ed. 2011). See also Edward A. Laing, *The Contribution of the Atlantic Charter to Human Rights Law and Humanitarian Universalism*. 26 WILLAMETTE L. REV. 113 (1989).

Bay, Newfoundland in August, 1941.¹⁸ At the outset of the meeting, the British undoubtedly wanted greater military involvement in the war against Germany by neutral America, not yet a formal belligerent. President Roosevelt, worried about the domestic opponents of the war such the isolationists, had the more subtle, focused and far-reaching goal of agreeing to a set of fundamental principles that would guide the Allied cause in the future.¹⁹

Specifically, before the meeting of the two leaders, Roosevelt made it clear to his private advisors that he wanted a concise statement of *war aims from the very beginning* that forcefully articulated that the goals of the war included self-determination for all peoples and nations, including the colonial as well as conquered nations of the world.²⁰ He thought the failure to issue such war aims, especially the failure of President Wilson to get all the allies to sign off on the Fourteen Points prior to America's entry into World War I contributed, in part, to the fiasco of the Versailles negotiations and treaty.²¹ FDR strongly believed that President Wilson missed a golden opportunity to end European colonialism during the last World War since he (Wilson) did not require the Allied powers to agreed to and sign off to the his "14 Points" as a price for America's decisive entry into the war. Ironically, when the Germans finally surrendered in November, 1918, they did so based on Wilson *nonbinding* 14 Points.

So, President Roosevelt was determined not to repeat the same mistakes as his predecessor. According to memoirs of the meeting, (written as the war in Europe continued) Under Secretary of State Sumner Welles wrote that President Roosevelt approached his first meeting with Prime Minister

18 SUMNER WELLES, *THE TIME FOR DECISION* (Harper & Brothers. 1944). I am in debt to Welles' other books that he wrote during the war but this was the first and main one.

19 ROBERT E. SHERWOOD, *ROOSEVELT AND HOPKINS, AN INTIMATE HISTORY*. (Enigma Books rev. ed. 2001). See also SUMNER WELLES, *SEVEN DECISIONS THAT SHAPED HISTORY* (Harper & Bros. Publishers 1951); WELLES, *supra*, note 18; For an intimate view of Roosevelt's first perceptions of Churchill, see: ROOSEVELT, *supra* note 15. In his book, Roosevelt's son Elliot, a U.S. naval officer at the time, also reveals his father's determination to raise the colonial issue within the delicate diplomacy of the looming war (for the U.S.) Finally, see: Foster Rhea Dulles & Gerald E. Ridinger, *The Anti-Colonial Politics of Franklin D. Roosevelt*, 70 *Pol. Sci. Q.* 1 (1955).

20 WELLES, *supra*, note 18 and 19. See also see ROOSEVELT AND SHERWOOD, *supra*, note 19 and, more generally, Foster Rhea Dulles & Gerald E. Ridinger, *supra* note 19;

21 SHERWOOD, *supra*, note 19; WELLES, *supra* note 19; ROOSEVELT (Elliot), *supra* note 15. Finally, see WEINBERG, *supra*, note 1, for how this issue between allies played out during the course of the war.

Churchill with a definite agenda in mind. Speaking of President Roosevelt, Welles states that:

“he [Roosevelt] felt it imperative to take up for consideration certain major political problems. Most important among the political problems which he desired to discuss with Mr. Churchill was the need for a general agreement between the two governments, while the United States was still at peace and the European war was still in its earliest stages, covering the major bases upon which a new world structure should be set up when peace finally came...The President rightly believed that the mere announcement of such an agreement would prove invaluable in giving encouragement and hope to the peoples now fighting for survival.”²²

A close aide of the President, Robert Sherwood, as well as Roosevelt’s own son, on hand as a military officer at the summit, both later confirm basically Welles’ account concerning the planning and thinking behind the meeting. In short, President Roosevelt was determined to use this first summit between Churchill and himself to obtain a basic statement of the ultimate allied war aims, including the enduring recognition of equality among all peoples.²³

Due to the delicate diplomacy needed to forge an alliance that would survive the savagery of war, President Roosevelt did not seem to emphasize or constantly advertise his personally strong antipathy to colonialism or his Administration’s anti-colonial purposes during the summit. He simply seemed to want the words to speak for themselves; he especially seemed intent that any ensuing Declaration resulting from the summit would represent a diplomatic demarche, and clearly state that all peoples have the right to choose the form of government under which they will live.

Not surprising, Roosevelt addressed the subject of issuing such a declaration of war aims immediately upon his first meeting with Churchill on the US warship *Augusta*, and Churchill quickly agreed. In fact, in his memoirs, *The Hinge of Fate*, Churchill claims to have written the “first draft” of the Atlantic Charter.²⁴ This is undoubtedly true; however, there is good evidence Roosevelt already had a very good idea of what he wanted the

22 WELLES, *supra* note 19, at 174. See also Memorandum of Conversation from Sumner Welles, Under Sec’y of State (Aug. 11, 1941) (on file with The Avalon Project at Yale Law School); Thomas H. Greer, *What Roosevelt Thought: the Social and political Ideas of Franklin D. Roosevelt* (Mich. St. Univ. Press reprt. 1958).

23 SHERWOOD, *supra*, note 19; Welles, *supra* note 19; Roosevelt (Elliot), *supra* note 15

24 WINSTON CHURCHILL, *HINGE OF FATE* (Houghton Mifflin 1950).

agreement to say; after expressing his enthusiastic approval for Churchill's proposal, President Roosevelt stated that "he would like to consider the precise text very carefully in order to be certain that *all the points which he himself had already formulated, and which he regarded as essential*, were amply covered." (Emphasis added)²⁵

There is, in fact, strong further evidence that FDR had already written out "all the points...which he regarded as essential" while working with Welles in Washington D.C. in the days before the first summit between the leaders. A key Roosevelt aide at the time, Robert Anderson, reports that then acting Secretary-of-State Sumner Welles wrote out a working draft of Roosevelt's personal ideas of a declaration while still in Washington, D.C., before the meeting, and took it to the summit; The President's son, who was with his father as a young naval officer throughout the summit, reports essentially the same facts and similar discussions.²⁶ Not surprisingly, as soon as the President received Churchill proposal for such a joint declaration, he tasked Welles to work with the British to help write out the first draft of the document. Welles continued to work with the Prime Minister and Sir Alexander Cadogan until the final draft was agreed upon at the end of the summit.²⁷

Examining the Charter reveals, not only what was specifically what it says or implies but, as important, to whom it is addressed—the "peoples" or "nations" of the world—terms that American statesmen would repeatedly use during the war in order to include colonial subjects as well as the conquered populations living under the Axis yoke; even so, the Charter itself is seemingly simple, and succinctly states:

THE ATLANTIC CHARTER:

The President of the United States of America and the Prime Minister, Mr. Churchill, representing His Majesty's Government in the United Kingdom, being met together, deem it right to make known certain common principles in the national policies of their respective countries on which they base their hopes for a better future for the world.

First, their countries seek no aggrandizement, territorial or other;

25 WELLES, *supra* at notes 18, p 175 - 176. Also see SHERWOOD, *supra* at note 19.

26 ROOSEVELT (Elliot), *supra* note 15.

27 WELLES, *supra* note 18, p 175-176; Also see SHERWOOD, *supra* at note 19. ROOSEVELT (Elliot), *supra* note 15

Second, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned;

Third, they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self government restored to those who have been forcibly deprived of them;

Fourth, they will endeavor, with due respect for their existing obligations, to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity;

Fifth, they desire to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labor standards, economic advancement and social security;

Sixth, after the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all lands may live out their lives in freedom from fear and want;

Seventh, such a peace should enable all men to traverse the high seas and oceans without hindrance;

Eighth, they believe that all of the nations of the world, for realistic as well as spiritual reasons must come to the abandonment of the use of force. Since no future peace can be maintained if land, sea or air armaments continue to be employed by nations which threaten, or may threaten, aggression outside of their frontiers, they believe, pending the establishment of a wider and permanent system of general security, that the disarmament of such nations is essential. They will likewise aid and encourage all other practicable measure which will lighten for peace-loving peoples the crushing burden of armaments.

Franklin D. Roosevelt
Winston S. Churchill
August 14, 1941 ²⁸

28 See: Declaration of Principles, *supra*, note 2.

The heart of the Charter is the section on the “certain common principles...on which they base their hopes for a better future for the world.” From the perspective of the American government and many colonized populations, the Atlantic Charter recognized first and foremost the rights of all peoples to self-government and, in essence, self-determination. President Roosevelt knew that the American people, particularly the vocal isolationists, were not going to support a war effort that resulted, once again, in the triumph of European colonialism.²⁹ Hence, at least for the American government, the nations held under colonial control held precedence over states’ once sacred claims to the “right” of colonial domination as a domestic matter. The United Nations Charter later enshrined the right of peoples to self-determination which is, in essence, recognition of the nation or nations’ rights on the international plane prior to statehood.³⁰ This was, perhaps, the most important element of the Charter. In short, the Atlantic Charter, taken at its face [or literal] value, is addressing the “peoples” or “nations” of the world, not simply “states.”

For Roosevelt, the distinction was critical since he was convinced that people left in colonial servitude after this war was won would sow the seed of future wars. Such a belief, of course, directly clashed with British colonial and imperial policies.

As John J. Sebrega states, the “language of Point Three [of the Atlantic Charter] would cause much mischief in the Roosevelt-Churchill ‘special relationship’ during World War II.”³¹ Yet, at the time, eager to forge an Anglo-American relationship, if not alliance, Churchill put on a brave face and agreed to the Charter.

There is strong evidence that the British people and, indeed, Churchill’s own war cabinet were not impressed, to say the least, with the summit

29 SHERWOOD, *supra* note 1; WELLES, *supra* note 18 and 19; ROOSEVELT, *supra* note 15. Gerhart Weinberg points out in his monumental *opus* that the issue of British imperial and colonial policy would continue to plague U.S.-British relationships during the war, even in the vital area of military planning, especially in the Mediterranean.; See, for example, WEINBURG, *supra* note 1, pgs. 591-593, 726-727. The great British scholar William Roger Louis discusses the difficulties that American attitudes and policies towards British colonialism, presented to Anglo-American relations during and even after the war; See his monumental work in this regard: William R. Louis, *Imperialism at Bay: The United States and the Decolonization of the British Empire, 1941-1945*, (Oxford Univ. Press 1978).

30 “The purposes of the UN Charter are...To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...” U.N. Charter, *supra*, note 3, ch. 1, art. 1.

31 John J. Sebrega, *The Anti-colonial Policies of Franklin D. Roosevelt: A Reappraisal*, 101 *Pol. Sci. Q.* 65, (1986). Also see LOUIS, *supra* note 29.

statement or results, and many sought clarification concerning what the Atlantic Charter stated.³² But it was too late; the message, hope and promises of the Charter were sweeping the globe.

As General Carlos Romulo of the Philliphines stated:

I toured the Asiatic territories and I learned from the leaders and the peoples of the flame of hope that swept the Far East when the Atlantic Charter was made known to the world. Everywhere these people asked the questions: Is the Atlantic Charter also for the Pacific? Is it for one side of the world, and not for the other? For one race and not for them too?³³

President Roosevelt soon answered the General's question. In a radio address to the American People soon after Pearl Harbor, President Roosevelt made the global scope of the Atlantic Charter fully explicit; in his "Broadcast to the World" on February 23, 1942. Roosevelt stated that: "The Atlantic Charter applies not only to the parts of the world that border the Atlantic, but *to the whole world*; disarmament of aggressors, *self-determination of nations and peoples*, and *the four freedoms—freedom of speech, freedom of religion, freedom of want and freedom from fear.*"³⁴ (Emphasis added)

As we shall see, the origins of the fiduciary Law of Nations is found, in part, within the wording of the Atlantic Charter, addressed to the "peoples" or "nations" fighting (or conquered by) fascism, as well as in its recognition of a right that a people already possess prior to statehood, namely the right to self-determination. In fact, the Charter's deliberate wording that it contains "certain common principles" contributed to the subsequent creation of fiduciary general principles of international law in the post war world, especially within the Charter of the United Nations. (Much of the wording for Preamble and Article 1 of the Charter comes from this document, as well as the ensuing Declaration written four months later.) In short, this was not simply a creative act of propaganda. In the face of a great and seemingly growing mortal danger, the Allied governments would endorse the Atlantic Charter's norms as fiduciary "promises to keep"—if and when the war was won.

32 See SHERWOOD, *supra* at note 19, p. 362-363. Also, for another viewpoint, see: LOUIS, *supra.*, note 29.

33 Diplomacy: New Approaches in History, Theory, and Policy (Paul Gordon Lauren ed., The Free Press 1979).

34 Franklin D. Roosevelt, President of the United States, Fireside Chat: Broadcast to the World (Feb. 23, 1942) (transcript available at <http://www.mhric.org/fdr/chat20.html>).

For instance, the Atlantic Charter states as a goal, after Allied victory, for a world in which “all the men in all lands may live out their lives in freedom from fear and want (paragraph six).” This is the beginning of Roosevelt’s attempt to have the four freedoms recognized as explicit war aims; 35 this led, in turn, to the eventual recognition of these freedoms as human rights in international law that belong to individuals and to the peoples as a whole.

As a result, Roosevelt was recognizing on an international level what the peoples of the world already possessed. States are not the sources of human rights nor can a government give what they don’t own. According to John Locke, individuals and the nation or people as a whole, inherently possess these rights naturally and preserve these rights when they create a social contract to live together in a civil society.³⁶ (In contrast, hypothetically speaking, there is no need to recognize human rights in a society of one.) By agreeing to the Atlantic Charter and to the subsequent wartime January 1st, 1942 Declaration of United Nations (below), governments were simply recognizing these rights for the first time on an international plane; this wasn’t necessarily due to altruistic motives but rather as a consequence of their mortal danger, and subsequent need to mobilize millions of people to serve in, fight, sacrifice, kill and possibly die in the war.

In this context, the telegram from Secretary-of-State Cordell Hull to American Ambassador in Great Britain John Winant immediately after the Atlantic Charter Conference is revealing of this promissory intent. Hull was concerned that the press in London seemed uncertain about the meaning of the fourth principle of the Atlantic Charter. He bluntly warned Ambassador Winant:

Actual and potential victims of the Axis powers will not take hope and do their up-most to resist aggression by joining forces with the United States, the United Kingdom and other like-minded nations if they gain the impression that the basic fourth point of the joint declaration is in reality an empty promise.³⁷

35 Greer, *supra*, note 22; See also Edward Mortimer, *The World that FDR Built: Vision and Reality*. (Charles Scribner’s Sons 1988); Warren F. Kimball, *Forged in War: Roosevelt, Churchill and the Second World War* (Harper Collins reprint. 1998).

36 John Locke, *Second Treatise of Government* (C.B. Macpherson ed., Hackett Publ’g reprint. 1980). See also A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton Univ. Press reprint. 1995). Finally see: William Ebenstein, *Great Political Thinkers: Plato to the Present* 120 (Holt, Rinehart & Winston 4th ed. 1969).

37 Telegram from Cordell Hull, Sec’y of State, to John Winant, Amb. I the U.K. (Aug. 25, 1941), available at <http://avalon.law.yale.edu/wwii/at11.asp>.

Hence, this is episodic evidence that even America's Secretary-of-State saw the Charter as essentially a promissory declaration.

Furthermore, the promissory nature of the Atlantic Charter is evidenced by the formidable task explicitly referred to in paragraph six the Charter that was facing the two powers, namely "after the final destruction of the Nazi tyranny." In the summer days of 1941-- long before Midway, (a stunning U.S naval victory only six months after Pearl Harbor which allowed the Allies to focus their first priority on winning the war in Europe), El Alamein, Stalingrad, Rome, Normandy or Remagen--this was not at all a foregone conclusion. In fact, in August 1941, the outcome of the war in Europe, China and the Pacific was very much in doubt.

The savagery of the war would soon become fully apparent to all those who met at Placentia Bay. For instance, President Roosevelt and Prime Minister Churchill first met on the decks of the massive British battleship, the *Prince of Wales*, which was tragically lost with almost all hands only four months later in a futile effort to support the besieged British garrison at Singapore. This loss, alone, must have been a searing heartbreak to the statesmen and senior military leaders who had enjoyed the hospitality, accommodations and friendship of the officers and crew during the first summit between Prime Minister Churchill and President Roosevelt; yet, more tragic news was yet to come, especially since the Allies would need to cross the oceans to fight their enemies. Added to the losses that the American sustained at Pearl Harbor, the Allies lost between the historic meeting at Placentia Bay in August 1941 and the end of the year -- a four month period -- almost a dozen capital war ships or cruisers, as well as scores of merchant ships with thousands of brave seamen to the Axis powers, a rate that simply could not be sustained if they had any hope to win the war.³⁸

Even so, the Charter planted the seed that was to grow, as the war progressed, into a highly developed system of promissory declarations to be fully redeemed, supposedly, in the post war world. Yet, all of this was still uncertain, and premature in August, 1941. Unfortunately, events were quickly to get much worse in the dark days of late 1941 and early 1942.

38 See CURCHILL, *supra*, at 24. Also see note 39, *infra* (below).

THE PROMISES CONTINUE: THE DECLARATION OF [THE] UNITED NATIONS, JANUARY 1, 1942:

The Atlantic Charter can't be read in isolation from its immediate historical times, popular impact, or subsequent developments. This is because, within four months of signing the Atlantic Charter, the United States was attacked by Japan at Pearl Harbor and, within days, Hitler declared war on the United States as well. So, in early December, the United States suddenly found itself engulfed as a full combatant in a world war.³⁹ In the Pacific, the Japanese invaded the Philippines, Wake, Guam as well as the Malay Peninsula, taking the great naval base of Singapore, providing them access to the Indian Ocean and possible link up with the Nazis. In Europe, Hitler's armies were poised to strike before Moscow; the Germans were also building up an army and air force to strike eastward in Africa towards the Suez Canal. In war theaters throughout the world, the Allied powers seemed to be in full retreat while the victorious Axis powers were advancing. 39 The fast and furious pace of events resulted in the United States quickly forming an alliance with the other countries at war with fascism and signing together a joint declaration that reiterated the importance of the Atlantic Charter.

In his memoirs, *A Time for Decision*, Sumner Wells discusses the link between the Atlantic Charter and the Declaration stating that:

“When the United States was forced into war less than four months later [after the Placenta Bay meeting] the Atlantic Charter became the agreement that was to bind together the United Nations. It linked them as allies during

39 WEINBERG, *supra* note 1; CHURCHILL, *supra* note 24, at 16. During this time (August-December, 1941), the Americans lost several battleships at Pearl Harbor, though some were recovered for use later in the war. During this time, in oceans across the world, the British Royal Navy suffered heavily as well, losing 4 battleships, a heavy cruiser and an air craft carrier during these four months, though the two battleships “sunk” in Alexandria Bay in December 1941 were later raised and used successfully in the war. Even the Australian navy was fighting *both* the Japanese and German navies close to home, losing the cruiser *HMAS Sydney* with all hands to a heavily armed German raider disguised as a merchant ship, which was also sunk, just off its western coast in Nov., 1941. During this time, American merchant ships were being sunk just off the coast of the United States by U-boats personally ordered there by Hitler. So, the shock, proximity and losses of war were quickly evidenced to everyone on the Allied side in the fall and early winter of 1941. While wartime leaders don't advertise or often record their defeats, shocks or personal setbacks, the cumulative impact of these tragic Allied naval losses at the time—added to the disastrous news from almost all fronts --must have weighted very heavily on the Allies leaders and diplomats who were meeting in Washington to sign the Declaration of United Nations on January 1, 1942.

the war, and pledged them to continue their association after victory had been won. In January, 1942, the United Nations Declaration adhered to by all the governments at war with the Axis powers, and later signed by additional governments as they also entered the war for liberty, bound them all to support the principles set forth in the Atlantic Charter and committed each of them to make no separate peace with the Axis nations so long as the war continued.”⁴⁰

In a robust display of solidarity and alliance, the United States joined 25 other governments -- eight of whom were in exile -- to make the “Declaration Of [the] United Nations” on January 1st, 1942 in Washington, D.C. which reads as follows:

DECLARATION of [the] United Nations

A Joint Declaration by the United States, the United Kingdom, the Union of Soviet Socialist Republics, China, Australia, Belgium, Canada, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, El Salvador, Greece, Guatemala, Haiti, Honduras, India, Luxembourg, Netherlands, New Zealand, Nicaragua, Norway, Panama, Poland, South Africa, Yugoslavia The Governments signatory hereto,

Having subscribed to a common program of purposes and principles embodied in the Joint Declaration of the President of the United States of America and the Prime Minister of the United Kingdom of Great Britain and Northern Ireland dated August 14, 1941, known as the Atlantic Charter.

Being convinced that complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands, and that they are now engaged in a common struggle against savage and brutal forces seeking to subjugate the world,
[Emphasis Added]

DECLARE:

40 Welles, *supra*, note 18, p. 178

(1) Each Government pledges itself to employ its full resources, military or economic, against those members of the Tripartite Pact:* and its adherents with which such government is at war.

(2) Each Government pledges itself to cooperate with the Governments signatory hereto and not to make a separate armistice or peace with the enemies.

The foregoing declaration may be adhered to by other nations which are, or which may be, rendering material assistance and contributions in the struggle for victory over Hitlerism.

Done at Washington

January First, 1942⁴¹

In this historic Declaration, the signatory governments announce their joint commitment to the “common programme of purposes and principles...known as the Atlantic Charter.” They then expand this to include the recognition of human rights, perhaps for the first time, as an international issue and norm “in their own lands as well as in other lands,” and not simply within the domestic jurisdiction of the state.⁴² Finally, each government pledges to cooperate with the other government signatories and not make a separate peace with the enemy. In short, the entire document is in the form of a promissory pledge to each other, and to the watching world, to do everything in their power to win the war to insure life, liberty, independence and religious freedom, and to preserve human rights and justice; So the government signatories are undertaking the solemn pledges possible among themselves and, via the Atlantic Charter, to the peoples of the world. As we have seen, the Roman legal term “fiducia” can be defined as a “pledge” and is the basis of fiduciary interests, norms and relationships that characterize the Law of Nations.⁴³

41 Declaration of United Nations, January 1, 1942. Dept. of State Bulletin, V I., p.3.; See *supra*, note 2.

*The “Tripartite Pact” refers to the Axis powers consisting of Nazi Germany, Italy and Japan.

42 *Supra*, note 41. To my knowledge, this is the first time in the context of World War II that governments explicitly recognize human rights as an international issue and responsibility i.e. “preserve”.

43 The term “Law of Nations” has a long and varied career in western jurisprudence, beginning with the Romans, appearing in Blackstone and even in the U.S. Constitution. For instance, see Thomas Boudreau, “The Modern Law of Nations: Jus Gentium and the Role

Acting in good faith, the signatories to the Declaration were creating solemn fiduciary obligations during times of mortal danger. As we have seen, the Atlantic Charter was originally signed by two governments as representatives of their respective states. In contrast, the Declaration of United Nations expands upon the number of signatory governments from two (in the Atlantic Charter) to twenty-six, and many of the signatories are not, as we shall see below, typical or even legally speaking, sovereign states. This was, in part, by intentional design by Roosevelt and his Administration.

For instance, India was a colony of Britain; in fact, the British war cabinet at first seemed to flatly reject the idea that India might sign the declaration at all.⁴⁴ In contrast, President Roosevelt, urged on by Harry Hopkins, was eager that India sign the Declaration and Roosevelt, in an extant working draft in his own hand, even indicated the first ordering of India's place very high in the list of signatories, though this was later revised.⁴⁵ In doing so, Roosevelt was undoubtedly expressing his conviction that the Atlantic Charter, which was reaffirmed in the Declaration, applied to India and to other colonies after the war was won.

Also, upon closer scrutiny, almost one half of the signatories of the historic yet often overlooked "Declaration of [the]United Nations" on January 1st, 1942 were conquered, colonized or "self governing" countries. Unless one resorts to a legal fiction in such situations, the "state" in such signatories was often *de facto* governments or nations effectively severed from the full legal characteristics of statehood. Hence, President Roosevelt's personal

of Roman Jurisprudence in shaping the post World War II International Legal Order" in the summer 2012 issue of the *Digest* published by the Syracuse University's College of Law. Also see the prescient book by the distinguished jurist PHILLIP JESSUP, *A MODERN LAW OF NATIONS*. New York. Macmillan Company, 1948. Jessup rejects the idea that this law is similar to the Roman idea of *Jus Gentium* consisting of a "law common to the whole of humanity" which, in contrast, I accept, analyze and defend in the *Digest* essay. Also see GERHARD VON GLAHN more recent book *LAW AMONG NATIONS* also published by Macmillan, first in 1970 (I believe) which is largely an excellent explanation and defense of state-centric public international law.

44 SHERWOOD, *supra* note 19. Sherwood quotes Lord Halifax's alarm at the inclusion of India in the Declaration, so much so that Halifax wrote Churchill (then in Washington D.C.) that "this is a mistake, and I would hope it might be reconsidered." P 447-448. The Americans were insistent, and India was included. For FDR's personal list, *See*: SHERWOOD, *supra* at note 19, p.450-453. FDR personally listed India in the top ten, ahead of most other Allied signatories.

decision to call the signatory powers the “United Nations” seems to be a very accurate description of the alliance.⁴⁵

Furthermore, several signatories were “dominions” of the British Empire and did not seem to enjoy full control of their foreign relations, a legal requirement for full statehood. The government of Australia was then described by the British, not as a “dominion,” but as an independent “commonwealth” subject to the King George VI, who was regarded as the sovereign.⁴⁶ (There were similar arrangements with the other dominions in which the sovereign power of the King was apparently represented locally by a residing Royal Governor or Governor-General.) This led to some confusion in the sovereign powers and capacity of Australia; for instance, Churchill and the Prime Minister of Australia John Curtin were to have a famous dispute almost a half year later over precisely who had the right to command Australian troops in the field⁴⁷. Churchill ordered them to Burma and elsewhere in the spring of 1942 while the Australian Prime Minister ordered them home to defend down under from possible Japanese invasion. Despite these political difficulties, the Australians were to provide stellar and very heroic service in both the European and Pacific theaters during the entire course of the war.

45 Townsend Hoopes & Douglas Brinkley, *FDR and the Creation of the U.N.* (Yale Univ. Press reprinted 2000) (1997).

46 King George VI demonstrated greatness as a wartime leader, staying in London with his family during the German bombing campaigns, visiting his dominions under German assault such as Malta in 1943 and supporting the Anglo-American Alliance via his personal diplomacy, including visits to American (and other Allied) troops in joint operations with their British counterparts in the field. Furthermore, he was, in my judgment, a “behind the scenes” keen observer, if not supporter, concerning the idea of the “equality of nations” that FDR publicly championed. For instance, the King, in his speech to the first meeting of the United Nations held in London in January 1946, expressed “our faith in the equal rights of men and women and of nations great and small.” To demonstrate this, he then presided over the largely peaceful transition of the British Empire to the Commonwealth, and was entitled “Head of Commonwealth,” a title that his daughter, Queen Elizabeth II inherited and preserves. See WILL SMITH, *THE ROOSEVELTS AND THE ROYALS: FRANKLIN AND ELEANOR, THE KING AND QUEEN OF ENGLAND AND THE FRIENDSHIP THAT CHANGED HISTORY*, (John Wiley and Sons, 2004).

47 See, for example, Exchange of Cablegrams between Mr. Churchill and Mr. Curtin, 1941-1942, NAA: A5954,581/17. Also see DAVID DAY’s biography on the Australian Prime Minister, JOHN CURTIN: A LIFE HAPER COLLINS, SYDNEY, 1999. Finally for Churchill’s side of the story, see e.g., Churchill, *supra* note 24, at p 10-19, 140-42. Part of the legal requirement for statehood is control of one’s own foreign policy, including control of one’s own troops. See SLOMANSON, *supra* note 10, concerning the four legal criteria for defining a state.

Furthermore, almost a third of the signatories, eight in all, were governments in exile. (Due to Soviet occupation, some of these governments never effectively reasserted their control over their native homelands after the war was won.) The presence of so many governments in exile presents the most extreme example of the distinction between the people or nation on one hand, and the government on the other since the state has literally been disemboweled by the war.⁴⁸ In short, this is *not* an example of international law making largely between states which was traditionally done before World War II.

This is why the Declaration doesn't say: "The States signatory hereto"—rather it simply says: "The Governments signatory hereto." In short, this was patently not a source of state-centric law. As argued here, it's a promissory or fiduciary pact made *in solemn good faith* between governments and the allied, conquered colonial or neutral peoples of the world. As the great American jurist Oscar Schachter states in this regard:

[P]olitical texts which express commitments and positions of one kind or another are governed by the *general principles of good faith*. Moreover, since good faith is an accepted general principle of international law, *it is an appropriate and even necessary to apply it in a legal sense*. (Emphasis Added,⁴⁹

Elaborating upon this in the text *International Law* (co-authored by Louis Henkin, Richard Pugh and Hans Smit), Schachter continues:

A significant practical consequence of the 'good faith' principle is that a party which committed itself in good faith to a course or conduct or to recognition of a legal situation would be estopped from acting inconsistently with its commitment or adopted position

48 Governments in-exile have often created perplexing problems of definition and appropriate powers in international law. See, e.g., RICHARD CRAWFORD PUGH, OSCAR SCHACHTER & HANS SMITH, *INTERNATIONAL LAW: CASES AND MATERIALS* 283-85 (Louis Henkin ed., West Group 3d ed. 1993).

49 OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE*, 178 Rec.des Cours 120 (1982-V). Also "unjust enrichment" is a general principal of international law, meaning that governments can not make promises, win victories, and then enjoy the fruits of winning without first keeping their promises to their own and other peoples.

when the circumstances showed that other parties reasonably relied on that undertaking or position.⁵⁰

Schachter is here pointing out another general principle of domestic and international law, namely that *unjust enrichment* based upon the failure to perform or deliver what was promised has legal consequences as well, especially when “other parties reasonably relied on that undertaking or position.” Failure to act upon one’s promises gives rise to the “legal situation” that Schachter discusses, and the courts then can address. Thus, the general principle of “good faith” can create a legal obligation in an ensuing “legal situation,” especially when people rely upon such promises -- as they did in World War II -- to the point of sacrificing their own lives.

In other words, the making of solemn promises in good faith by governments to their own and other peoples *in times of mortal danger to all* is precisely such a “legal situation” that creates ensuing fiduciary duties and obligations by the promissory parties—in this case the threatened governments. At the time that the Declaration to [the] United Nations was made, January 1, 1942, President Roosevelt and other allied leaders seemed to realize that such promises must be made in good faith to the peoples of the world especially when, at the time, it seemed as though the Axis were winning the war.

Thus, the Declaration was written as a solemn pact made in good faith became, a source trust law between governments and their peoples, not simply a treaty between states. Specifically, the Atlantic Charter and the Declaration of [the] United Nations became significant sources of the most serious and solemn fiduciary obligations that a government or peoples can incur. This is especially true since the profound purpose of these first promissory documents was to create a wartime alliance between nations and governments in a mortal struggle for their very existence. “Promises made” in such circumstances must become, legally speaking, “promises to keep,” especially if the nations of the world do their critical part in fighting to reverse the tide of defeats, and eventually through great sacrifices finally succeed in winning the war.

50 SCHACHTER, *supra*, note 49, at 100. Prof. Oscar Schachter was one of the truly great international jurists of the 20th century, and it was my pleasure to know him as a wise counselor, unofficial mentor and friend.

PROMISES MADE: THE CRUCIBLE OF WORLD WAR II

The Declaration is addressed, at this bleak moment in the war, to neutral, conquered or colonial peoples throughout the world, as well as each other's domestic populations. Though historians might be tempted by hindsight to say that victory was certain in that war, the outcome was very far from clear to the statesmen signing the UN Declaration on a cold winter day in Washington D.C. at the very beginning of the new year, 1942.

In particular, the Allies had reason to fear that the conquered or colonial peoples, such as the Ukrainians, or peoples of French Indochina as well as the colonized peoples in India and Africa might join the Axis cause. For instance, an outburst of anti-colonial sentiment, or even an uprising anywhere along the rim of the Indian Ocean, covered then with European colonies, would give the Nazis and Japanese a natural point and strategic place to link up their forces, with devastating consequences for the Allies.

To prevent such a dangerous development in the Indian Ocean, Churchill personally ordered in early 1942 the invasion of Vichy controlled Madagascar, over the heated objections of his own military chiefs, to prevent a possible link up and subsequent mortal threat to the Suez Canal and the critical British, Australian and other Allied military forces facing Rommel. He devotes an entire chapter in his volume *Hinge of Fate* to this ultimately successful assault.⁵¹ In short, preventing a German-Japanese linkup in the Indian Ocean as well as keeping the neutrals and colonized peoples out of the war was a critical concern of the Allies, especially in the first desperate months of 1942. The balance of power at this time was extremely precarious; for instance, the siding of the Turkish or Spanish people, alone, with Nazi Germany might have made a decisive difference in the European war during the early 1940s had they joined the Axis powers.⁵² These dangers reinforce the reality of the dire Allied situation at the time; to confront these great and growing dangers, the Allies signed the Declaration as a promissory pact between governments and their own as well as other peoples throughout the world. A significant purpose of the Declaration was, in effect, to give hope of independence to those millions still under European

51 CHURCHILL, *supra*, note 24. See, in particular, See Chapter 13, "Madagascar." Also, Gerhard L. Weinberg is one of the very few modern historians who recognizes the strategic importance of the Indian Ocean in general, and potentially Madagascar in particular during World War II. See WEINBERG, *supra*, note 1. Fortunately, Churchill recognized it *at the time*.

52 WEINBERG, *supra*, note 1. Also see Welles' concern about Spain at: WELLES, *supra*, note 18.

colonial control and thus attract their allegiances so that they would not be tempted to join the Axis powers.

The Roosevelt Administration never lost sight of this collective audience. This is one of the reasons that led Assistant Secretary-of-State Sumner Welles to state at Arlington National Cemetery, a few months later, on the solemn occasion of the American Memorial Day, 1942 that: “This is a people’s war. It is a war which cannot be regarded as won until *the fundamental rights of the peoples of the earth are secured*. In no other manner can a true peace be achieved. (Emphasis Added)”⁵³

These wartime promises, embodied in the Atlantic Charter and the Declaration of [the] United Nations, undoubtedly aided in influencing millions of colonial subjects in Africa, the Middle East, and Asia to fight against, or at least not aid, the Axis Powers. For instance, specific efforts by the US and British governments were immediately commenced, based upon the Atlantic Charter, to insure that the colonies of Africa would remain on the Allied side. (Committee on Africa, the War and Peace Aims, 1943).⁵⁴

In this way, the Allies sought to address, convince or influence the peoples of the world on every inhabited continent that the promises they were making in the Declaration concerning a united alliance, the recognition of international human rights and the other rights promised in the Atlantic Charter, would be kept—if the peoples played their part against the enemy states. In this sense, *the promises and principles enunciated by the Allies, first in the Atlantic Charter and then in the Declaration, and subsequently in other wartime statements (such as the Moscow Declaration of 1943) were far more important than the specific names of the signatories*; specifically, the promises of the four freedoms and human rights as well as the principle of self determination for all peoples by the Allies would prove to be more decisive and remembered, in terms of their ensuing impact on a world war. Thus, the statesmen and women who signed the Declaration on that cold morning of January 1, 1942

53 Welles, Sumner, Under Sec’y of State, Memorial Day Address at the Arlington National Amphitheater: World Leadership to Protect Peace (May 30, 1942), available at <http://www.ibiblio.org/pha/policy/1942/420530a.html>. Also see: Vital Speeches of the Day New York: The City News Publishing Company, Inc. Vol. III, Oct. 15-1941-Oct. 1, 1942

54 Agnes Crawford, Leaycraft Donohugh, Comm. On Afr., The War, and Peace Aims, The Atlantic Charter and Africa from an American Standpoint, 1943. This was an ironically, heavily British influenced publication that portended some of the possible post war problems with keeping the promises of decolonization. The British keep their promises; the same can’t be said of the French who did not sign the original Declaration, unlike some other European governments whose territories were occupied.

must have realized -- as Welles and others in FDR's administration apparently did -- that they were promising to usher in a new world that would seek to be free from the tyranny of the lawless state if their governments and peoples managed to first defeat and eventually destroy the advancing Axis powers.

In essence, these principles and promises of the Atlantic Charter, the Declaration of [the] United Nations and subsequent intergovernmental statements created fiduciary obligations, relations, interests and duties concerning the peoples of the world.⁵⁵ (These solemn Declarations, like the post Moscow Four Power Summit Declaration (1943) could be described as an "Executory Trust" since later covenants and treaties, such as the Charter of the United Nations, would be required to fulfill these wartime promises,⁵⁶ though as we shall see it will be ultimately up to the courts to decide if other characterizations of a trust may apply as well). The governments are simply the trustees of the promises made, written literally in the blood of the people who together with their governments (including the governments in exile within the allied cause) fought this war on countless fronts throughout the globe.

So, analyzing the January 1st, 1942 Declaration illustrates that, *in times of mortal danger*, governments, and not simply "states" can and do create binding international obligations, interests, duties and norms i.e "Promises Made" that are of a legal nature and must be kept after the danger passes. Traditional international lawyers may assert that only states can make international law; yet, such an assertion, in order to be valid, requires that

55 There is a massive literature, of course, on the history and nature of a trust and the ensuing fiduciary duties, interests or relationships. See for example: TAMAR FRANKEL, *FIDUCIARY LAW*. Oxford. Oxford University Press. 2010. My favorite source is, of course Locke's *Second Treatise*, especially in terms of the relationship between a fiduciary and governance. See LOCKE, *supra*, note 36. For a breach of fiduciary duty, see: *Meinhard v Salmon* (1928) 164 NE 545 AT 546. For a historical perspective, see: *GAI INSTITUTIONES OR INSTITUTES OF ROMAN LAW BY GAUIS*, with a translation and commentary by Edward Poste. Oxford: Clarendon Press, 1904.

56 I argue that wartime declarations like the Moscow Summit's "Declaration of the Four Powers" created, in essence, an executory trust since it promised and thus required a charter for an international organization as well as trials of the Axis warlords when and if the war was won. For authority on the construction of an executory trust, see *City Bank Farmers Trust Co. v. The Charity Org. Soc'y*, 265 N.Y.S. 267 (App. Div. 1933); *Martling v. Martling*, 55 N.J. Eq. 771 (1898); *Carridine v. Carridine* 33 Miss. 698 (1857); *In re Fiar's Estate*, 60 P. 442 (Cal. 1900). See also, *HOOPE'S 7 BRINKLEY*, *supra*, note 45. Such an executory trust is not mutually exclusive of other potential or actual fiduciary obligations, norms, duties and trusts created by the promissory *corpus juris* of World War II. These will be for present and future courts to ultimately decide.

the profound innovation, changes and, in fact, revolution in international law caused by World War II simply be ignored, or reduced—where-ever possible to simply examples of state-centric law making. This insistence on the state-centric origins of international law is a “cookie cutter” or “one size fits all” approach to international law that simply doesn’t reflect World War II and post war legal developments and realities. Because of this, the traditional framework simply isn’t adequate to analyze or explain the extraordinary advances in international law that resulted from the Allies ongoing solemn promises made during desperate times to win the war by appealing to almost all the peoples and nations on the globe. In this sense, traditional lawyers who insist that only states can be a sources of international law are like Dante’ hapless geometer, in the very last Canto of the *Paradiso* who “sets himself to measure the circle and who findeth not, think as he may, the principle he lacketh.”

The Declaration of [the] United Nations was critically important because it set the *pattern for promissory declarations or statements between governments and their people throughout the war*, unlike international treaties made between states, this Declaration was structured an intra-state, or even a pre-state pact (in the case of colonies, dominions and the Australian commonwealth) between government and its own and other peoples. In view of this, Bentham’s definition of international law as mainly consisting of agreements between sovereigns (states) is no longer controlling in many modern circumstances of international law. In particular, trustee obligations freely assumed by governments consisting of solemn promissory declarations or other government statements made in good faith intended for its *own and other peoples* results in enduring and evolving international legal obligations; specifically, the creation of fiduciary obligations by a government and promised for its own and other peoples is a source of international trust law that must now also be recognized, especially by the national or international courts, when necessary, as the hard-earned and lasting legal legacy of humanity.

So, these were the preliminary sources of an emergent international fiduciary legal order. In this regard, it is important to point out that courts have historically stated that ‘intent’ is *not* always a precondition of creating a trust, or fiduciary obligations. In the following section, we will explore the origins of the fiduciary foundations of these new legal norms in more detail by first examining the meaning of “fiducia” or “fiduciary” articulated by John Locke and, secondly, the historical development during and after World War II leading to a fiduciary Law of Nations.

PROMISES TO KEEP: THE FIDUCIARY FOUNDATIONS OF THE LAW OF NATIONS.

“Fides Servanda Est; Simplicitas Juris Gentium Praevaleat”

“Faith must be kept; the simplicity of the Law of Nations must prevail.”

3 Burrows 1672

Under the extreme pressure of a mortal threat, such as World War II, a government of a state made “promises” to its own people, and to other nations, in order to mobilize the thousands, indeed millions, of individuals necessary to serve, sacrifice, suffer and perhaps even die so that that government and the people would survive. This fulfills the critical condition that Oscar Schachter (above) states concerning *good faith in legal situations*, namely that “Other parties...concerned have reason to expect compliance and to rely on it.”⁵⁷

Even so, some might argue that any governmental promise or pledge made under such circumstances as a mortal struggle or declared war are made under duress and are purely propaganda with no lasting political or *legal* significance; Yet, such a cynical interpretation makes a mockery of the subsequent service *of the millions and their families* who believed in the statements by their governments concerning the ultimate purposes of the war; they believed in these promissory declarations to the significant extent that they left their home and peacetime jobs and served honorably, often enduring great hardships and sacrifice until the war was won; many of those who served never returned, having been killed on some distant shoreline, hilltop or forgotten battlefield.

For instance, by the end of World War II, large American cemeteries stretched from the Aleutian Islands in the North Pacific to North Africa, from the beaches of Normandy and Anzio to the frontiers of Germany, from Pearl Harbor and Guadalcanal to the blood-soaked sands of Iwo Jima. British cemeteries could be found from the home islands through France to Germany, from Burma and Malaysia to Indochina, not to mention the countless British, American and Allied sailors or soldiers lost at sea. Soviet cemeteries ranged from the steppes of old Russia, deep into the Ukraine and Crimea, from the gates of Moscow and Leningrad, from the Volga or the Don to the center of Berlin. The Australians, Canadians, Chinese, French and Poles, and many other nations had cemeteries scattered

throughout the war zones as well.⁵⁸ Most of these individuals were living breathing human beings when their governments first articulated and promulgated the promissory aims of the war in 1941 and 1942.

In short, before these promises could be even partially redeemed or fulfilled, hundreds of thousands of people were going to be killed in the attempt to win the war. In view of this, these wartime promises can't simply be construed or dismissed as simply *contractual* promises to specific individuals *or mere propaganda*; they created, in essence, fiduciary obligations, duties, relationships and interests creating an active, executory or even involuntary (among certain Allied Powers) trust between these governments, and their own and other peoples struggling to be free of German and Japanese militarism. These promissory statements were solemn declarations made to entire peoples, in their present and future capacities, to be redeemed after victory on countless battlefields across the globe. In particular, these promises made during the greatest war in human history constituted a lasting trust to be recognized or construed by domestic and international judiciaries once victory was achieved.

LOCKE'S ARGUMENT: GOVERNMENT AS A TRUST

That law is based upon a fiduciary duty or interest and relationship with the people is an analogous process and argument, in limited ways, to the ones outlined by John Locke in his *Second Treatise on Government*. In his classic *Treatise*, Locke argues that governments are created by the people as simply trustees of the people's rights; the people are the true trustors as well as beneficiaries of the fiduciary trust so established. In Locke's scenario, the fiduciary relationship is created basically by the people in which governments are created simply to serve as trustees.⁵⁹ For Locke, the only basis of legitimate government and law was the consent of the people; in turn, Locke thought that there were two types of consent, either "express" in which individuals overtly give their consent by oath or writing, and "tacit" in which people give their consent by their subsequent agreement or behavior that indicates acceptance of government as a trust; as A. John Simmons notes:

57 See SCHACHTER, *supra* at notes 49 and 50

58 In his monumental *opus*, *A World at Arms*, Weinberg details the horrific casualties and costs of the war. See WEINBURG, *supra* at 1.

59 See LOCKE, *supra*, note 36. SIMMONS, *supra*, note 36. EBERSTEIN, *supra*, note 36 (This is at least how governments, according to Locke, are supposed to operate; Locke of course was an optimist!)

Tacit consent, by contrast, seems to be consent given without words or explicit signs ('expressions'), given rather by other behavior that constitutes the making of a morally significant choice in a clear, noncoercive choice situation.⁶⁰

In view of this, it would be simply ludicrous to claim that the behavior of the millions who served to defeat the Axis powers, as well as the millions more back on the home-front who made the munitions, ships and tanks necessary to win the war were actually solely due to the government's *coercion*; the Allied peoples of the world knew what was at stake and wanted to win this war, though they knew it would — and did — cost them dearly. Thus, they consented to their government's policies and promises through their deeds and the massive resulting mobilization of entire nations needed to win the war. In short, express or tacit consent is at the heart of the Law of Nations, though obviously coercion was used by governments as well in the form of the draft, shooting deserters, etc.; yet, the Allied governments knew they couldn't win this war through coercion of their people alone. Hence they began to make the solemn promises in good faith that resulted, however unintentionally, in the Law of Nations as a lasting legacy of the war.

Hence, Locke's distinction between "express" or "tacit" consent⁶¹ in the formation of *government as a trust* is useful in analyzing the actual historical circumstances surrounding the creation of the fiduciary Law of Nations from the promises of governments during World War II. Thus, a personal or even moral choice was made that was, in effect, in total agreement with and acceptance of the governments' promises and purposes concerning the war. This consent indicates "acceptance" of the "promises made."

When millions of soldiers and their families accepted their duty to fight in the global war against fascism, they were, in essence, accepting their respective government's promises about the ultimate purposes of the war, thus giving their express or tacit *consent* (depending on the *sui generis* circumstances), a key factor for Locke in the formation of a binding political obligations; this includes the creation of a trust in which the people, in Locke's scenario, who are both the trustors and the beneficiaries. (In this

60 See SIMMONS, *Ibid.*

61 *Ibid.* Also see LOCKE, *supra*, note 36

sense, Locke echoes the original Roman use of the trust in which the trustor and beneficiary were often one and the same.)⁶²

In short, from a Lockean perspective, a soldier's service could be construed, in many if not most cases, as express or tacit agreement concerning the ultimate purposes goals of the war promised by his government. That the soldier may not survive his subsequent tour of duty is an unfortunate but very real condition and possible consequence of his service; hence, these promises made by his government and accepted or "consented" to by millions of soldiers do not create merely contractual obligations—since those accepting the contract may be required to die in its execution—hardly the recognizable conditions of a legal contract. In contrast, the creation of a trust does not always require the survival of the trustors; nor does a trust's creation always legally require actual intent. But a trust always demands that the promises made and agreed to must be kept in *good faith* to the beneficiaries.

Yet, it is important to note here that, unlike the theoretical account in Locke *Second Treatise*, in the actual historical circumstances of World War II, the governments, in essence, *created the ensuing fiduciary obligations*, duties and norms as *trustees* of the ensuing Law of Nations—if the peoples of their own and other countries first won the war. (These fiduciary obligations, duties and norms were mostly unintended, especially by the governments that keep their own peoples suppressed, such as the Soviets, though they supported to a limited extent the anti-colonial policies of FDR.) Fortunately, as courts have ruled many times, "intent" is not a necessary condition for the creation of a trust. In contrast, in Locke's scenario, the people themselves as *trustors create government and the resulting fiduciary relationships as a trust*. So, Locke's theoretical scenario within a domestic society is simply an analogous one to the actual historical scenario that unfolded during World War II.

The key question remains: Who then are the beneficiaries? In the case of the promises made by governments during World War II, as we have seen, the Allied governments were making promises to their own and other Allied peoples, as well as to the conquered, colonial and neutral nations of the

62 See: JAMES HADLEY, INTRODUCTION TO ROMAN LAW, IN TWELVE ACADEMICAL LECTURES 181 (D. Appleton & Co. 1873). See also ANDREW RIGGSBY, ROMAN LAW AND THE LEGAL WORLD OF THE ROMANS (Cambridge Univ. Press 2010); Also, see the classic source: HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS (Beacon Press, Boston 10thed. 1963) (1869). Also see GAUIS, *supra* at 55; Finally, see: FRANKEL. *Surpa* note 55. FIDUCIARY LAW (Oxford Univ. Press 2010).

world. *So, all these nations, as the peoples addressed by the Allied governments, are the true heirs and beneficiaries of the Allies' promises-- unless we view the promises of the Allies cynically, and suggest that these pledges concerning the ultimate purposes of the war were mere propaganda. Yet, these promises resulted in the subsequent confidence and "consent" of millions of soldiers to serve as a result of these promises, as well as the families and nation of the servicemen and women who accepted and acted upon these solemn promises made by the Allied governments during the darkest days of the war.* Specifically, since many of these so promised would not survive their ensuing service, these soldiers and their families were, in essence, agreeing to and expecting that their government and their courts would subsequently uphold and observe these "promises made" to their nation, as well as other nations so promised, if the war was won.

This is especially true if the beneficiaries -- in this case, the nations that took up arms against the Axis powers-- indicate through express or tacit consent their faith in, and reliance upon, the solemn promises made by their own and other governments during a time of mortal danger to all.⁶³ Insuring that such promises are kept has always been the traditional prerogative of the courts, especially if private or public parties—in this case, governments—*fail in their duties* as trustors of a fiduciary obligation or interest. In short, these promises created legal obligations that must be kept -- especially since the peoples of the world massively mobilized, with many nations fielding armies in the millions—in order to win the war over the Axis alliance.

Thus, the ensuing new duties, norms, and new legal relationships created by the Allies during the war concerning human rights, self determination and legal limitations on a state power to unilaterally use force are to be construed and enforced, if necessary, by national and international courts as unquestionably fiduciary in nature. In short, trusts are now a source of international law and it is ultimately up to national and international courts to review and decide whether the specific trust in question is executory, implied, public, special or some other form of fiduciary obligation. This is true especially in view of the historical record and ensuing legal developments in trust law and other legal areas during World War II. We will come back to this issue below in the section entitled "The Nation and the State: The New Problematique?"

Hence, Locke's theoretical account differs from the actual historical scenario and significance of the United Nations Declaration of January 1st,

63 LOCKE, *supra*, note 36. SIMMONS, *supra*, note 36. EBERSTEIN, *supra*, note 36

1942 in which the governments, some of whom are in exile, recognized the human rights (rights that individuals *already* possessed) of peoples everywhere.⁶⁴ In this sense, governments became trustees of the now *internationally* recognized rights of the peoples, thus creating a fiduciary obligations, interests, norms and relationships between the individual government and the nation or the people within a specified territory. These and other promises made by the Allied governments during the war, in a time of mortal peril, became the fiduciary property of the nation or people for all time—once the war was finally won.

Ironically, the French and Soviet governments would challenge this interpretation, especially after the war was over. For instance, in the end, Great Britain gracefully accepted and acted upon its wartime promises, and freed its colonial empire through a peaceful process. In particular, King George VI played a critical role as the sovereign of the United Kingdom who oversaw and supported, in words and deeds, the transformation of the British dominions and colonies to the enduring Commonwealth; his extraordinary role in this process has, in my judgment never been fully appreciated and deserves further research and inquiry. In contrast, France almost immediately reoccupied its former overseas colonies, apparently learning nothing after suffering from a brutal Nazi occupation of its own during the war. In fact, France's efforts in trying to reassert its colonial control and occupation of its overseas empire, ultimately resulting in its bloody and costly wars in Vietnam and Algiers. The Vietnamese and Algerians had read these promises too, and took them to heart to mean what they clearly stated—self determination and human rights for all peoples.

REVISITING THE *SECOND TREATISE*: LOCKE UNDERSTANDING OF “PROPERTY.”

At this point of our analysis, it is important to remember that John Locke defined “property” as a *person life and liberties* as well as his or her material possessions.⁶⁵ Locke emphasized that governments can not take or enrich themselves at the expense of the people's rights, life or natural liberties. For Locke, this is especially true of a government's fiduciary duties. In stating this, Locke is recognizing a well established principle of fiduciary law. The relevant law in Roman, medieval and modern times unanimously agrees that the person making the pledge can not unjustly enrich himself or herself by

64 See *supra*, note 2: Declaration of United Nations, 6 Dep't State Bull. 3-4 (1942). 1 January 1942.

65 LOCKE, *supra*, note 36. SIMMONS, *supra*, note 36. EBERSTEIN, *supra*, note 36

virtue of false promises made in bad faith to the trustor or beneficiaries; in almost any current rule or system of law, such promises so made must be kept, especially when the trustor risks so much because of his or her confidence in the promissory statements.⁶⁶ This duty led, in medieval feudal and English law, to the duty of *Fides Servanda Est*, which literally means “Faith must be observed;” specifically, an agent as trustor must not violate the confidence reposed in him.

In short, in the historically grounded creation of the fiduciary Law of Nations during World War II, the peoples of the world became, in essence, both the trustors -- as the source of the “property” consisting of their lives and liberties -- as well as beneficiaries of the enunciated rights, norms and duties newly recognized by governments due to their mortal peril. The Allied Governments became, in essence, trustees of their promises made in good faith to their own and other peoples. Other governments assume this role as trustee once they sign the Charter of the United Nations since it is a hybrid document and contains many of the promissory obligations, duties and norms concerning self determination, human rights, and collective security made during the war.⁶⁷

Yet, governments can’t provide what they don’t possess; in such situations, they can only *recognize and respect* their solemn obligations to respect the interests or “property” of others that already exists within a civil society,

66 Courts in multiple national jurisdictions, throughout the ages, have always held since Roman times that promises made in “legal situations” (Schachter, *supra*, see notes 49 and 50) must be kept to the promisee, especially if those so promised have incurred costs in their commitment to the implicit or explicit agreement. See REINHARD ZIMMERMANN. *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF A CIVILIAN TRADITION*. (Oxford U. Press, 1996). The idea of “trust” law probably came to English law via the Crusades and the crusaders’ encounter with Islamic law and culture. The concept of a “waqf” or a trustee relationship was well-developed when the crusaders came to the Holy Land yet not yet used, to my knowledge, in medieval English law until about the 1200s. For a brief analysis of the waqf system in Islamic law see: T. Kuran, “The Provisions of Public Goods Under Islamic Law: Origins, Impact and limitations of the waqf system. *Law and Society Review* 2001. Also see MW Leslie. “International Fiduciary Duty: Australia Trusteeship Over Nauru” *BU Int’l Lj*, 1990 reviews the history of the trust as well. Also See, TAMAR HELFMAN, “LAND OWNERSHIP AND THE ORIGINS OF FIDUCIARY DUTY, 41 *Real Probate and Trust Journal*, 651 (2006). For its modern manifestation in Anglo/American business law, See, e.g., Tamar TAMAR FRANKEL, *FIDUCIARY LAW*. (Oxford Univ. Press 2010). This is an excellent and encyclopedic treatment of the topic.

67 Under Roman Law as well as in Locke, it is possible to be both the trustor and beneficiary; this is still employed, though contested, in modern times as well. This argument is fully developed in my forthcoming book, BOUDREAU, *Law of Nations: Legal Order in a Violent World*. (manuscript)

although these liberties may be dormant and even unrecognized by the domestic government, especially upon an international level.⁶⁸ In short, as Locke suggests, the people *already possess these rights* that governments then promised, during World War II, to respect *on an international level* i.e. to observe and enforce for their own and other peoples, and holding leaders or others accountable for violations. As such, in the promissory declarations and Charters *supra*, governments recognized, for the first time, on the international level their new or fiduciary responsibilities to protect and respect the rights of all peoples to their lives, liberties and land.

As we have seen, these promises were to become *internationally recognized and accepted* by governments as the *common property and possession* of all peoples when and if the war was won. In view of this, a government recognize its own fiduciary responsibility as trustee of its new obligations, duties and norms on at least three levels; first, the government as trustee and especially its courts must recognize that these duties and norms belongs to the nation, to its people as an independent jural community⁶⁹; it does not originate with the state. This means, first and foremost, that that the fiduciary duties created by governments and promised to their own and other peoples during the agony of World War II, such as their observance of human rights and crimes against humanity, are self-executing within the nation as an independent jural community. Specifically, these fiduciary obligations, duties, norms and interests were created “below” the level of an interstate treaty and *are already binding on a nation's judiciary as a pre-requisite for the lawful exercise of a sovereign or state power and authority.*

Second, a government signing the Charter promises to recognize and respect these rights that also *belong to other peoples or nations beyond its own borders.* This is what makes these fiduciary legal obligations, duties and norms *international.* Hence, the observation, recognition and respect of these rights by a government and its courts become the new basis of legitimate legal and political power; a government and state is legally legitimate, in the first instance, to the extent it observes and respects its basic fiduciary legal obligations to its own and other peoples. Such recognition and respect may

68 Locke, *supra*, note 36. Of course, the origins of human rights on the domestic level are always hotly contested. For a natural rights argument, see: LEO STRAUSS, NATURAL RIGHT AND HISTORY (*Chicago*: University Of Chicago Press (October 15, 1999)). For an innovative argument on human rights, see: LOREN E. LOMASKY, PERSONS, RIGHTS AND THE MORAL COMMUNITY (Oxford, 1987). Finally, see the work of Douglas Donoho, e.g. “Relativism Versus universalism in human Rights: The Search for Meaningful Standards.”27 *Stan. J. Inter'l L.* 345 (1990-91).

69 BARKUN, *supra*, note 13.

be, in the last instance, in the form of prosecution of war criminals or other international criminals who violate the Law of Nations. This may require that national courts exercise universal jurisdiction more often than has happened in the past;⁷⁰ such jurisdiction has value in terms of deterrence as well as enforcement, so its potential role in upholding the Law of Nations should not be minimized by poor past state practice. Because of the solemn wartime promises and subsequent massive response, especially by the Allied peoples around the world who relied and acted upon these promises, at tremendous cost to themselves, the resulting fiduciary duties, norms, interests and relationships—after the war was won—became part of the very fabric of a legitimate government; as such, continual observance of these fiduciary obligations are a precondition for the legitimacy of its own sovereignty and state. In short, failure to do so gives rise to a legal cause of action that is actionable by other national or international courts. This is a critical point to which we will return in the latter part of this essay.

Finally, these rights and protections of the people are adjudicated by the judiciary in the *nation's own courts* as the ultimate safeguard of these fiduciary norms and duties such as human rights. Only if these internal institutions fail do the rights of jurisdiction accrue to international or other jurisdictions.⁷¹ In fact, inspired by a gifted student, I would argue that the term “self-determination,” often contested in the legal literature, is an evolving phenomenon and process that is ultimately expressed in a *fully independent judiciary* that is the permanent protectorate of the peoples’ rights and duties under the Law of Nations against potential governmental or state usurpations.⁷² Thus, the ultimate expression of “self determination” is a

70 See Princeton University, *The Princeton Project on Universal Jurisdiction, Program in Law and Public Affairs* (2001); See also UNIVERSAL JURISDICTION: NATIONAL COURTS AND PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW (Stephen Macedo ed., University of Pennsylvania Press 2004); See also Kenneth Roth, The Case for Universal Jurisdiction, FOREIGN AFF. (Sep./Oct. 2001). Also see:

Report of the Secretary-General, The Scope and Application of the Principle of Universal Jurisdiction. UN Doc. A/65/181 (July 29, 2010). Finally see: Maximo Langer. “The Diplomacy of Universal Jurisdiction: the Political Branches and the Transnational Prosecution of War Crimes.” AMER. J. INT’L. L. (2011), 105, P 1-49.

71 This is the legal basis of any jurisdiction by the International Criminal Court, set up by the Rome Statute of the International Criminal Court, A/CONF.183/9., 1 July 2002

72 The student name is Trevor O Connor—I am grateful for the idea which, upon reflection, I agree; also see: ANNE MARIE SLAUGHTER, *New World Order*, (Princeton: Princeton U Press, 2000). In particular, I was inspired by Anne Marie Slaughter's book in which she discusses the enhanced role of judiciaries around the world. Reading this book made me realize that the nation's own judiciary could be the ultimate custodian of the Law of Nations and, as such, pursued this idea to this current publication. Also see her: "Judicial Globalization," 40 Va. J. Int'l L. 1103 (1999-2000)

nation of laws, not of men especially in judicial matters of respecting basic human rights, and strict legal limitations on the legitimate use of force at home or abroad. In other words, the ultimate evolution of self determination is when the court decides, the nation abides.

After the war was won, governments and national courts have the paramount duty to enforce the resulting fiduciary norms, duties, relationships and interests promised to the peoples of the world—if they fought and won the war. With victory, a fiduciary Law of Nations, consisting of laws common to humanity, has slowly emerged. Yet, many of these new norms, such as the observance of international human rights or individual responsibility for war crimes are still inevitably contested in international and national jurisdictions. So, it is ultimately the role of present and future judges in national jurisdictions, international tribunals and the International Court of Justice (ICJ) to decide the scope and extent of this fully explicit fiduciary international legal order. Specifically, the role of the judiciaries across the world is not to *make* the law, but simply to *recognize and enforce* the fiduciary obligations, duties and norms accepted by governments during the war to insure that such lawless Leviathan's, such as Nazi Germany, never threaten international peace and security again. The Pinochet indictment in Spain, issued by Magistrate Garzon,⁷³ is a prominent, if not pioneering, example of this ongoing evolution in fiduciary international law that, as we shall see, developed during and after the greatest war in human history.

In this regard, it bears repeating that the established principle of Anglo-American law in this regard is “Fides Servanda Est,” or “Faith must be observed.” If the government fails in its primary duty to do this, then the national or even international courts must intervene to uphold fiduciary obligations. In this way, World War II resulted in a robust and fully explicit fiduciary international legal order.

The best way to characterize this new fiduciary legal order that resulted from the Allied victory in that war is to describe it as a “Law of Nations...common to humanity.” This is refinement of the ancient Roman idea of Jus Gentium founded in Justinian *Institutes*, and elsewhere in the classical world.⁷⁴ Due to the new Law of Nations, the people are now, at

⁷³ See Judge Garzon article in this issue of the *Journal*.

⁷⁴ CAESAR FLAVIUS JUSTINIAN, *THE INSTITUTES OF JUSTINIAN* 4 (J.A.C. Thomas trans., N. Holland Publ'g Co. 1975). Also *See* ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 14-15 (The Macmillan Company, New York, rev. ed. (1962) (1947) Finally, *see also* BENEDICT KINGSBURY &

least implicitly, the *imperium et imperia* (sovereign within the sovereign) of the newly legally limited state.

The new Law of Nations does not necessarily favor the nation over the state; it simply makes explicit the legal tensions and contested nature inherent in the relationship between the people and statist structures, powers and policies. As a result of the Allied victory in World War II, this law is available and common to all the peoples of the world as a way of recognizing human rights or providing universal jurisdiction⁷⁵ for war crimes or genocide that now legally constrain the once absolute state prerogative to use unilateral force or commence war. Since I explore the nature of the new Law of Nations as a “law common to humanity” elsewhere, I will not duplicate that argument here at this time.⁷⁶ Yet, it is important to note that in a pluralistic international legal order, a national jurisdiction -- depending upon its unique culture and historical evolution -- may incorporate or emphasize different aspects of the Law of Nations, especially at first, than another national jurisdiction. So practically speaking, there is no one standard for uniform or even universal incorporation of the Law of Nations into each national jurisdiction, though the legal obligations and duties always exist. In fact, these norms are self executing, as argued above, but this doesn’t always mean that these obligations will be politically or even judicially recognized. This reflects, in part, the inherent tension that almost always occurs between the nation and the government of the state; it is also an inevitable result of the differing legal cultures that have grown organically on their own native soil.

THE NATION AND THE STATE: THE NEW PROBLEMATIQUE?

Prior to World War II, the state in international law had unquestioned rights of sovereignty in domestic and often international affairs. The epitome of such a state is the Nazi regime in Germany before and during the war that became a lawless Leviathan towards its own and other peoples resulting in

BENJAMIN STRAUMANN, *THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS* (Oxford University Press, 2010).

⁷⁵ See *supra*, note 70.

⁷⁶ Thomas Boudreau, “THE MODERN LAW OF NATIONS: Jus Gentium and the Role of Roman Jurisprudence in shaping the post World War II International Legal Order.” *The Digest*, (2012) Syracuse University College of Law. I like to think that the differences of definition concerning the Law of Nations and international law between Blackstone, Bentham and the ones presented here represent the unique historical development and continuing evolution of the “nation” or the “state.”

the unparalleled and unprecedented tragedy of the Holocaust. After World War II, due to revulsion of Nazi atrocities—all of which were “legal” in the demented German legal system—this historical and highly evolved reification of the state sovereignty began to erode as states recognized via the *Charter of the United Nations*, the *Convention for the Prevention and Punishment of Genocide* and various human Rights declarations and covenants, increasing legal limits on their once almost unquestioned powers to use violence, especially in domestic affairs. These legal limits were almost all promised or inspired by developments and declarations during the greatest war in human history.

Since the war, the various courts throughout the world have clarified and enlarged upon their legal obligations to respect these new norms, even in the United States that makes an often strict delineation between domestic and international law. In a series of cases in the 1980s, specifically in the *Filartiga*, *Fernandez* and *Forti* cases heard in U.S. federal courts,⁷⁷ the judges examined post World War II developments in legal norms and used comparative legal research to come to their decision. In this way, the differential diffusion of fiduciary international norms created during and immediately after the war began to percolate through the once impermeable barriers of domestic jurisdiction. Simultaneously, the domestic diffusion of municipal and constitutional law continued to percolate into customary norms of international law, resulting in a “law....common to humanity.”⁷⁸ The historical and current legal record is very clear why this is occurring.

Specifically, after the horrors of the Holocaust and unprecedented slaughter of WWII, states could no longer claim that their own nation(s) or populations within their powers were merely a passive presence with no international status or standing, subject only to domestic jurisdiction. The international norms adopted during and immediately after the war represent nothing less than a radical repudiation of this previous impervious “domestic jurisdiction” doctrine of the state. The adoption of the Nuremberg Charter, the Convention on the Prevention and Punishment of Genocide and the revised Geneva Conventions of 1949 “internationalized” -- and hence made problematic-- the relationship between a state or government on one side, and its own or other domestic populations on the other. This leads inevitably to a legal split between the rights of the “nation” or the “people” united in a common jural community (able to assert its

77 See: *Filartiga v. Pena-Irala*. 630 F.2d. 876; *Fernandez v. Wilkinson*. 505 F. Supp. 787 (D. Kan. 1980); *Forti v. Suarez-Mason*. 694 F. Sup. 707

78 Boudreau, *supra* note 76

rights on a legal plane) and the responsibilities of a government; all too often these two different realities are rarified, abstracted and conflated into the simplistic political or legal construction of the “nation-state” or simply the “state.”⁷⁹

As we shall see, the Nuremberg Charter even recognizes a people’s rights, especially to exist free from arbitrary and overwhelming violence, against their own government.⁸⁰ The entire thrust of these legal innovations was to limit and restrain the exercise of unilateral and illegitimate force by a state against its own or other peoples. The result was the largely unintended yet enduring creation of a new fiduciary Law of Nations that recognized that human rights, self-determination and the right of protection, even against one’s own government, were now an integral part of international law. These legal innovations result in a profound shift in the fundamental and historically competing sources of legitimacy and sovereignty away from the state towards the nation or people of the polity. The people or nation is, in essence, the new *imperium et imperii* (sovereign within the sovereign) of the now legally limited state.

The apparent roots of *imperium et imperii* as an enduring concept was in the evolution of Roman Law in the post Empire period.⁸¹ Roman law ruled Europe for over a thousand years after the fall of the empire. Various kingdoms and principalities used Roman law to adjudicate their disputes and property rights throughout the so-called Dark and Medieval Ages of Europe. The first recognized use of “Imperium et Imperii” was apparently during this time to describe the idea of a divided sovereignty between the rulers and the ruled. Yet, the term can also be used to describe the ideal

79 For a refreshing exception to this oversight, see: FRANZ OPPENHEIMER AND JOHN M. GITTERMAN, *THE STATE*. (BiblioBazaar, 2009). While I don’t share the authors’ faith in many of their Libertarian beliefs or their Marxist conclusion in the “withering away of the state,” they present the critical tensions between the nation or civil “society” versus the state.

80 See *supra* at note 4. Also see: Theodor Meron “International Criminalization of Internal Atrocities.” *Amer. J Int’l L*, 89, 3 July 1995, pp 554-577. This article provides insights into post war developments since Nuremberg.

81 See, STEPHAN WEISS, *REGUM ET IMPERIUM* (Paris Institut Historique Allemand, 2008). This really is a concept that seemed to emerged in the Middle Ages though, of course, refers back to the Rome. See T. BROUGHTON, *THE MAGISTRATES OF THE ROMAN REPUBLIC VOL. 3* (New York, American Philological Association, 1951-52) (describes this power as the Imperium, which was often delegated, but presumed to be exercised on behalf of the Roman people as a whole).

political arrangement of the early Roman Republic between the Senate and the Roman people.⁸²

Yet, the idea of an *imperium et imperia* did not become fully articulated or developed until the Medieval Ages in Europe when Roman Law was increasingly utilized, and sometimes conflicted with Canon law, to describe and regulate the growing complexities of commerce as well as the relationship between a people and their polity. In the late medieval ages, the idea of the *imperium et imperii* seemed to exist more of an interrogatory as progressively the Church, the divine right of kings and ultimately the people claimed to be the true basis of legitimate political authority.⁸³ With the Glorious Revolution in England, the American Revolution in the New World and the French Revolution on the continent, the primacy of the people as the source of legitimate state authority seemed more assured, though always precarious. Yet, with the rise of fascism and communism in the 20th century, the people's role in politics, let alone as the legitimate source of political authority, seemed highly problematic to say the least.

In the post World War II period, the term “*imperium et imperii*” accurately describes the lasting significance of the new Law of Nations; traditional (pre-World War II) international law was—and often still is—usually defined solely in terms of state centric law, or law made between sovereign states; in particular, before World War II, matters between the “nation” and the “state” were universally regarded as almost wholly within the domestic jurisdiction of the specific government in power and hence untouchable by international law.⁸⁴ Due to the profound legal innovations during and immediately after the war, such a “traditional” definition of international law is no longer historically plausible or legally accurate.

Since World War II, the legal (and political) reality of the relationship between the nation and the state is now much more complex and problematic. This more complex relationship obviously sets up a dynamic tension between the fiduciary and other rights of the nations, and the powers and authority of any particular regime; the people want to preserve their rights and security, and governments, qua governments, usually want

82 *Ibid.*, Also see BOUDREAU, LAW OF NATIONS (Forthcoming manuscript)

83 *Ibid.*, Andreii

84 There were, of course exceptions: piracy, slavery and the Leagues' mandates; but I would argue that these-- especially the latter, the mandates -- were episodic, often un-enforced and largely ineffective. Furthermore, we still have slavery and piracy today.

to increase their power and control.⁸⁵ The result is an ongoing and sometimes contentious processes of dynamic mutual definition or defiance, competing constructs or contested powers, as the nation and state vie with each other for ascendancy in private law, public affairs and political power. In view of these conflicting claims, the courts of each national jurisdiction as an independent jural community must, in the first instance, adjudicate the controlling Law of Nations. The evolving doctrines and development of humanitarian intervention and the related yet distinct Responsibility to Protect (R2P) reflect this contested reality in the ongoing and often debated practices of states. We will come back to this briefly later on in this essay.

These debates reflect, in part, that new legal realities has emerged in the post World War II world. *In particular, as seen above, fiduciary international law now limits and sharply curtails the unilateral violence that a government can legitimately use against its own or other peoples.* The most important consequence of this is that the legitimacy of state authority rests more solidly on the conduct or practice of the state in actually observing the Law of Nations with its own and others people. This is especially true in terms of the state's now legally limited ability to unilaterally attempt to legitimate the use of military or other deadly force in international affairs. For instance, this new legal reality in the Law of Nations is enshrined in Article 51 of the hybrid Charter of the United Nations. In short, as we shall see, the observance of the new fiduciary legal order becomes the *sin qua non* of a state's legitimacy and authority.⁸⁶

PART II: AFTER VICTORY: A REPUBLICAN ORDER OF RIGHTS AND RESTRAINTS

The new Law of Nations is at the heart of post World War II domestic and international legal limits binding the once absolute and sovereign state. This "Law of Nations" created by the Declarations, Conventions, Charters and treaties resulting from World War II, especially the Charter of the United Nations, represent the latest development in republican security theory concerning the constraint and control of unilateral political power, whether

⁸⁵ This is a truism that borders on a tautology; to demonstrate this, simply examine current headlines or read a good history book. Of course, the horrific ultimate example of this is the Nazi regime. See WILLIAM SHIRER, *THE RISE AND FALL OF THE THIRD REICH* (Simon & Schuster, 1990) that chronicles the seemingly endless gasping and predations for power of this lawless leviathan.

⁸⁶ See *supra*, note 10. i.e. Thomas Boudreau, *Jus Gentium and Systematic Legal Order: New Paradigm for International Law*, 5 INT'L PERSP. (1994).

exercised by the individual, group or state.⁸⁷ As mentioned in the beginning of this essay, *this law, in particular, limits and sharply curtails the unilateral violence that a government can legitimately use against its own or other peoples.*

In his award winning book, Bounding Power, Daniel Deudney points out that *republican security theory* has been concerned with the restraint of centralized and unilateral or arbitrary political or military power since classical times.⁸⁸ From this useful theoretical perspective, the ultimate significance of the New Law of Nations can be found in the enduring republican structures that resulted from the fiduciary promises made by the Allied powers to their own and others peoples during World War II. The so-called International Bill of Human Rights and other various human rights regimes that evolved out of the wartime promises, such as the Declaration of [the] United Nations made by the Allies can also be understood and explained as republican systems of security restraints upon the once almost absolute prerogatives of the state to use unilateral force, even against its own people.⁸⁹

The Charter of the United Nations, and even the veto power that it establishes, can be cited as prominent though imperfect examples of republican restraints upon political and military power.⁹⁰ The UN Charter has its origins in the same promissory declarations and agreements, such as the Moscow Declaration of 1943, as the fiduciary Law of Nations. Due to the egregious examples of Nazi Germany and Japan, the soldiers and statesmen who had just survived a savage war who drafted the Charter were determined that such unilateral powers of aggression would never be lawfully used again. Hence, the Charter specifically prohibits the unilateral use of force in international affairs except in cases of armed attack against a member (Article 51). In such a situation, a member state of the UN has the

87 See: DANIEL DEUDNEY, BOUNDING POWER: REPUBLICAN SECURITY THEORY FROM THE POLIS TO THE GLOBAL VILLAGE. (Princeton: Princeton University Press, 2007)

88 *Ibid.*

89 See *supra* notes 2-10.

90 THOMAS BOUDREAU, SHEATHING THE SWORD: THE PREVENTIVE ROLE OF THE UNITED NATIONS SECRETARY-GENERAL (Westport: Greenwood, 1991). In this book, I talk about the potential value of the veto to prevent action and thus inhibit the exercise of force. In short, the power to prevent is the power to control. Hence, I think it provides an example of a negarchic restraint that Prof. Deudney so admirably articulates and develops in BOUNDING POWER, *supra*, note 87. Due to drastic editorial cuts, SHEATHING THE SWORD (my first book) is basically a "Cliff-Notes," abbreviated and an inadequate version of my Ph.D. dissertation (1985) "Watchman of the Peace" on the same topic; the latter is a much better document.

inherent right of self defense. This is an almost unprecedented repudiation of the use of force in international affairs that had been largely accepted as “legal” since the Treaty of Westphalia. This is a singular, though often unobserved, new restraint in international relations.

The veto power of the Permanent Members of the UN Security Council can also be described as a republican restraint. Though often overlooked, the veto power can *prevent* a course of action including military adventurism. As described elsewhere, the veto power provides the “power to prevent,” as well as enable, and thus can be characterized as a mechanism of international or republican restraint.⁹¹

Finally, the Charter’s recognition of human rights, even in the abstract (as critics note), is a significant source of potential restraint among states. Since the adoption of the Charter, there has been unprecedented activity by scholars, diplomats and policymakers alike in trying to make a workable human rights regime that is global in scope. One result of these efforts is the “International Bill of Rights” consisting of several Declarations, treaties and conventions that are increasingly cited in domestic jurisdictions from around the world.⁹² While far from perfect, the ensuing human rights standards and legal regimes are a marginal yet increasingly important, system of restraint in international affairs, especially when coupled with the developing global telecommunication technologies that add transparency and provide instant communication of violations or atrocities throughout the world.

These restraints, however inchoate, were accepted by the victors in World War II, though after much internal debate at the drafting convention of the UN Charter in San Francisco. Such an interpretation is consistent with the one put forward by G. John Ikenberry in his groundbreaking book After Victory that the most successful and enduring political orders that emerge from war are those that include the voluntary restraints on power by the victors (Ikenberry, 2001).⁹³ As we have seen, this process of imposing legally binding self-restraints on state power began *at the very beginning* of World War II in an attempt to mobilize the millions of allied, conquered, colonized, commonwealth and neutral peoples of the world in order to win

91 Ibid, BOUDREAU

92 *Supra* notes 10, 11, 12

93 G. JOHN IKENBERRY, AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT AND THE REBUILDING OF ORDER AFTER MAJOR WARS. (Princeton U. Press 2001).

the war. When they did, the victorious governments recognized at San Francisco during the drafting of the United Nations Charter (and afterwards), in essence, a system of self-restraints such as self-determination, human rights, war crimes against one's own and other peoples as well as the legal commitments to collective security against an aggressor that have been described elsewhere as a new Law of Nations common to the whole of humanity. Hence, *the ultimate measure of a state's own legitimacy as a sovereign power is its recognition and respect for these new fiduciary norms and relationships, described here as the modern Law of Nations* that includes human rights and collective security, solemnly promised by the allied governments during World War II to their own peoples, as well as to the conquered, colonized or neutral nations of the world—after they won the war. So, significant state departure from these new norms—such as starting a war, war crimes or genocide—brings about a serious legal cause of action that can be prosecuted, via universal jurisdiction, when possible, in any national, transnational (regional), intergovernmental or global court.

THE NUREMBERG CHARTER: THE NATION VS. THE STATE

As we have seen, in signing the Declaration by [the] United Nations, the signatory governments (including several governments in exile), under mortal duress, reaffirmed the principles of the Atlantic Charter and, in doing so, simply recognized what the conquered, colonial and other democratic peoples already possessed—namely the right to human rights and self-determination.

The Nuremberg Charter (written *after* the drafting of the UN Charter began) took the *a priori* existence and rights of the nation *one step further, and stated that no government has the right to, in effect, make war against its own peoples or the peoples in other nations under its control.* In short, groups, the nation or nations were recognized to possess certain rights on the international level which they can claim even against their own government. Hence, there has been a *significant expansion in terms of the subjects in international law*, both in terms of the recognition on the international plane of these nations' rights, and subsequent state responsibilities.

The Nuremberg Charter, and subsequent trials, reinforced and expanded upon these legal limitations.⁹⁴ By recognizing crimes against peace and crimes against humanity, as well as codifying customary law concerning war crimes, the Nuremberg trials further limited sovereign states hitherto

94 *Supra*, note 4. Also see: TELFORD TAYLOR. THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR. Little, Brown & Co., 1993.

absolute rights to legitimate unilaterally political violence. This included even violence directed against a state's own domestic population, an area once considered untouchable by international law. Finally, the Nuremberg Trials held *individuals* responsible, and sentenced several German warlords to death, for the crimes committed by the Nazi regime. Henceforth, in a truly revolutionary development, individuals were held accountable under international law for crimes they committed while “serving” their government. Thus, the new limits to unilateral legitimating of political violence involved explicit individual and state responsibilities as an inherent part of international law.

This development was clearly intentional; as Telford Taylor, America's chief legal counsel at Nuremberg, states:

The United Nations and the Nuremberg trials were initially twin offspring of the Allied negotiations and agreements with respect to the peace that would follow victory... Different as the twins were, they shared the same two basic purposes: promoting peaceful rather than warlike settlements of international disputes, and humanitarian governmental policies.... Essentially, the Nuremberg trials were intended to bring the weight of law and criminal sanctions to bear in support of the peaceful and humanitarian principles that the United Nations was to promote by consultation and collective action.⁹⁵

This “twin offspring” of World War II questions to its very core the previous state-centric legal order; specifically, the sovereign state's once absolute legal right to decide the preeminent issue of war was sharply curtailed in favor of international recognition of human rights and collective security. The advent of such a system involved, at the time, the near universal recognition of human rights, collective norms, rights, obligations and sanctions contained in the U.N. or Nuremberg Charters. This development marked a watershed, a virtual revolution, in the international legal order. In particular, the Allied governments of World War II, after their experiences with Germany and Japan, were simply not content to leave the ultimate question of war solely to the unilateral decision of the sovereign state. Because of this, the existing legal order was largely replaced, or supplanted, by a new order that placed, for the first time, legal limits to a sovereign state's once absolute right to legitimate and wage war.

95 See TELFORD TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* (Quadrangle Books, Chicago, 1970). Also see TAYLOR, *supra*, note 94.

Nuremberg was necessary because of the unparalleled horrors of the Holocaust,⁹⁶ including Hitler's war against his own nation -- i.e. other Germans, especially German Jews (some of who served honorably in World War I), as well as against the gypsies and other civilians in other occupied territories. Hitler's war against entire civilian populations made it evident that nations as legally distinct entities need protection from states, including their own.

The following Nuremberg trials, which fully documented and presented in the courtroom the horrors of the Holocaust and other Nazi wartime atrocities, significantly contributed to the development of subsequent declarations, conventions and treaties, such as the Universal Declaration of Human Rights, Convention on the Crime and Punishment of Genocide and the revised Geneva Conventions of 1949.⁹⁷ In this regard, the solitary work and efforts of Raphael Lemkin, who tirelessly advocated for the adoption of the Genocide Convention, stands out as a beacon of inspiration and deserves special mention here; A Polish lawyer from a Jewish family, Lemkin prophetically began his efforts to prevent mass murder in the 1930s at the League of Nations before the outbreak of World War II.⁹⁸ Lemkin even coined the term "genocide," meaning the killing of an entire group, or contributing to conditions leading to its demise. He continued his tireless work to protect entire peoples continued during World War II, during which he lost most of his family in the Holocaust. Despite his devastating loss, Lemkin persevered and was finally successful in getting the Convention adopted in 1948. As such, he is a true hero of humanity and provides an enduring inspiration to work for a lawful world for generations to come.

This new emphasis in international law on legally protecting entire groups of peoples, first emerging out of the Nuremberg Charter, and subsequently in the Convention on the Prevention and Punishment of Genocide (that criminalized genocide) was the first recognition on an international plane that individuals and groups and entire nations had essential innate and legal rights, in essence, against their own government or other states.

96 See: PETER LONGERICH *Supra* note 1. Also See: Michael Marus, "The Holocaust at Nuremberg," yadashem.org/holocaust/

97 See *Supra* notes 1- 11 for this wartime and post war *corpus juris*.

98 JOHN COOPER, RAPHAEL LEMKIN AND THE STRUGGLE FOR THE GENOCIDE CONVENTION. Palgrave Macmillan, 2004. Also see Lemkin's own book written during World War II: RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE (The LawBook Exchange, Ltd., 2005.)

NEVER AGAIN? THE INTERNATIONAL CRIMINAL COURT AND R2P

The importance of protecting civilians from a assaults by their own or other governments, especially genocidal assaults aimed at destroying a portion of, or even entire peoples, is a main reason behind for the creation of the International Criminal Court (ICC) in the 1990s. The Rome Statute creating the ICC went into force on July 1, 2002 after ratification by 60 countries.⁹⁹ The creation of the Court is a watershed event in international affairs in general and international law in particular;¹⁰⁰ This is because, by its mere existence, the Court may help deter leaders thinking of embarking upon devastating unilateral wars; as such, it certainly embodies some of the key characteristics of systematic restraint that Daniel Deudney describe as essential to a negarchic world order characterized by the inhibition of the illegitimate use of force. The ICC is the court of last resort that will hold individual leaders for the launching of war, and for the subsequent war crimes committed by the guilty parties. The indictment of Pinochet as a former head of state has now been duplicated by the ICC which has even indicted a sitting head of state, Al-Bashir of the Sudan. The message seems clear: If you commit war crimes, or crimes against humanity, “You can run, but you can’t hide.” The potential deterrence value of the ICC will be very hard to measure, but one can anticipate that this value will become very real, especially after other present or future (as well as active or retired) heads of states and their advisors are indicted by the ICC and tried for their crimes. This would be inconceivable without the legal legacy of the Nuremberg Charter and trials after World War II.

THE TWO EDGED SWORD? HUMANITARIAN INTERVENTION

The evolving and contested doctrines of humanitarian intervention and Responsibility to Protect (R2P) recognize that, if a domestic government fails in its primary responsibility to protect its own civilians, then other governments may have a legal responsibility to act and intervene to stop massive bloodshed.¹⁰⁰ Such doctrines can be, admittedly, a dangerous and double-edged sword to wield, as Hitler himself demonstrated in

99 Rome Statute, ICC-ASP/2/Res.3, U.N. Doc. A/CONF.183/9 (July 1, 2002) (is the legal bias of any jurisdiction by the International Criminal Court).

100 See Secretary-General’s Report: “In Larger Freedom: Towards Development, Security and Human Rights for All” A/59/2005 in which the doctrine and criteria for the R2P are outlined.

Czechoslovakia or Poland; in both cases, Hitler cited the supposed dangers to Germans living in these countries as a main reason to invade and, in essence, initiate World War II.¹⁰¹ Thus, humanitarian intervention can be easily used to overstep the boundaries of civilian protection to include conquest and fundamental regime change.

Yet, precisely because of Hitler, the necessity of such international intervention, especially in genocidal situations, has been legally recognized after World War II. Unfortunately, in my judgment, protecting people against genocidal assaults has been a major failure of the UN Security Council, as well as international society as a whole, in the post WWII War world as the situations in Bosnia, Rwanda and Darfur illustrate.¹⁰² These terrible episodes are one of the contributing reasons to the creation of the ICC in 2002. States simply can't, or won't protect their own or other civilian populations adequately despite the terrible lessons of World War II. If states won't prevent such assaults against civilians, then the emphasis must be, in the short term, focused on capturing and punishing all those suspected of or complicit in the commission of war crimes and crimes against humanity. Domestic courts in national jurisdictions can play a critical role in this regard by enforcing the fiduciary Law of Nations that emerged out of World War II.

In short, the configuration of legal relationships surrounding the concept of the "nation-state" and its population has become much more complex, distinct and separate, since the post WW II revolution in international law. This is due, in large part to the assault by the state on its own or other peoples. As we have seen, such genocidal or military assaults are also one of the critical causes contributing to the emergence of a fiduciary Law of Nations out of the ashes of the greatest war in human history.

PART III: THE LAW OF NATIONS AND A FIDUCIARY INTERNATIONAL LEGAL ORDER: CLIMATE CHANGE AND THE ATMOSPHERE AS A TRUST.

Of course, a fiduciary international legal order is not new; at least since after the time of Grotius and the publication of his *Mare Nostrum* (1609), the principle of the freedom of the seas has been recognized as part of

101 SHIRER, *Supra* at 85.

102 See, e.g., DANIEL REIFF. *SLAUGHTERHOUSE: BOSNIA AND THE FAILURE OF THE WEST* Touchstone, 1996. Also see: JAN WILLEM HONIG, NORBERT BOTH. *SREBRENICA: RECORD OF A WAR CRIME*. Penguin Books, 1997

international law.¹⁰³ Since the time of Grotius, the idea that *the global commons belongs to everyone* -- consisting of the oceans, the atmosphere, the polar ice caps and near outer space -- has been increasingly recognized, though hotly contested as well. The modern Law of Nations simply expands upon and makes fully explicit this traditional fiduciary international legal order that seeks to recognize, maintain and even regulate for present and future generations perhaps the most powerful forces on or above earth—the global commons.

In this regard, it is important to note that the Law of Nations, like the doctrine concerning the freedom of the Seas, is capable of evolution and growth within this traditional fiduciary legal order. This is especially true of the Charter of the United Nations and the legacy principles of human rights, self determination, trusteeship and collective security that it contains. For instance, the accepted practice of UN peacekeeping—mentioned nowhere in the Charter—is an accepted outgrowth of its primary mission to maintain international peace and security. In short, evolution, as the outcome of experience, is the life of the law.

Such evolution is important because, increasingly, there are significant threats to international peace and security emerging from potentially catastrophic climate change, as documented by the International Panel on Climate Change (IPCC).¹⁰⁴ Space here does not permit a thorough review of the scientific evidence for the human contributions to climate change, nor does it allow for the detailed review of the legal argument that the United Nations General Assembly might possess the legal power to monitor and maintain the global commons, beginning with the Earth's atmosphere; this argument is made in my forthcoming book (when and if finished) entitled the *Law of Nations: Legal Order in a Violent World*. Even so, a few words on this critical topic facing the world should be ventured, especially in view of the growing droughts and dangers posed by climate change world wide.

As argued above, the Charter of the United Nations was a direct result of promises made to Allied peoples during World War II, especially the Moscow Declaration (1943) and, as such, is a hybrid document consisting of

103 GROTIUS. THE FREE SEA. Liberty Fund, Inc., 2004.

104 See, e.g.: Intergovernmental Panel on Climate Change (IPCC). Contribution of Working Group I to the Fourth Assessment in 2007. Some political or economic pundits disagree with the emergent world wide scientific consensus concerning human contributions to global climate change. Such politically inspired denial is simply ideological fiddle playing while the world burns.

treaty and trust law. The idea of trusteeship was, in fact, central to the founders of the United Nations, especially since many of the founders, as well as colonized subjects, anticipated the end of European colonialism under the tutelage of the new organization.¹⁰⁵

To do this, the Charter established an international trusteeship system and the Trusteeship Council, one of the six main organs of the United Nations.¹⁰⁶ Though decolonization occurred largely outside the auspices of the United Nations, the fiduciary foundations of the United Nations Charter may provide an unanticipated basis for addressing global climate change, especially if the global commons are involved. The legal argument for doing is summarized, and inevitably simplified as follows. First, under the Trusteeship system as defined and developed in Chapters 4 and 12 of the United Nations Charter, the United Nations General Assembly could make specific recommendations (Article 13) to “promote the progressive development of international law and its codification” concerning the need to monitor and maintain the earth’s atmosphere as a global trust for present and future generations. As we have seen, the Charter of the United Nations has its fiery origins in the same fiduciary promises made to the peoples of the Allied powers during World War II. In short, it is part and parcel of the fiduciary foundations of modern international law.

In this regard, it is important to point out three critical legal aspects of the UN Charter. First, in Chapter IV of the Charter, the General Assembly is given the power to “perform such functions with respect to the international trusteeship system as are assigned to it under chapter XII and XIII.” Second, despite popular misconceptions, due to the reluctance of the colonial powers to have their colonies (or themselves!) *specifically named* in the Charter, the *actual legal emphasis in Chapter XII* is not on the many meanings of the specific word “territories” used in the Charter, but on the subsequent formation of “special agreements” to be approved by the General Assembly.¹⁰⁷ Third, because of this, the General Assembly can vote to

105 This was clearly President Roosevelt’s idea and intent. See *supra*, notes 35, and 46. For a personal account of the American efforts to establish a trusteeship system at the San Francisco Convention, see BRIAN URQUHART. RALPH BUNCHE: AN AMERICAN ODYSSEY. W.W. Norton & Co., in 1993. Mr. Ralph Bunche was clearly aware of the aspirations of colonial subjects for freedom and self determination, promised during the war, and tirelessly worked as part of the U.S. delegation for the Trusteeship system during the drafting of the Charter at San Francisco.

106 See *supra*, note 3.

107 See: R.N. CHOWDHURI. INTERNATIONAL MANDATES AND TRUSTEESHIP SYSTEMS. The Hague: Martinus Nijhoff, 1955. Also see: CHARMIAN EDWARDS

make the Earth atmosphere part of a “special agreement” that is approved by a majority of its members. It then can proceed to hold “special sessions” (Article XX) every spring to recommend the formation of specific legal conventions that address specific probable causes and cures for climate change. This process of the progressive codification of international law can compliment, and not contradict, the largely defunct Post Kyoto Protocols process that has, so far, resulted in perilously little real abatement of carbon consumption throughout the globe.¹⁰⁸

Several of the Earth global commons are detrimentally impacted by climate change since the oceans retain some of the resulting heat increases of the earth atmosphere, and the polar caps, especially the Arctic ice sheet, are simply melting; as the latter proceeds, *there can be no greater warning of the impending dangers* than these ominous developments, especially in the melting of Greenland and the Arctic ice. (Elsewhere, I argue that the polar caps are common above 80 degrees latitude- except for land claims based upon close contiguity; in fact, Antarctica, *in toto* is, and should be recognized as a global trust.) Yet, it is indisputable, despite the contested legal status of the polar caps, that the ice is melting at an unprecedented rate. The growing endangerment of polar species, such as possibly the polar bear, that take tens of thousands of years to evolve, should indicate that this is not the norm.

So, at least three proposals have already been considered in a domestic and international literature to address these dangers to the Earth’s commons. The first is, of course, the controversial carbon cap idea, an idea that I once favored and promoted within the UN community in New York City; but now I am convinced that the world’s governments will sell and consume almost all the oil and coal that they can obtain, regardless of the growing dangers perhaps to the very fabric of life presented by climate change.¹⁰⁹ So

TOUSSAINT. THE TRUSTEESHIP SYSTEM OF THE UNITED NATIONS. Praeger, Inc., 1956. Also see *supra* at note 3, GOODRICH AND HAMBRO

108 This paragraph summarizes a chapter in my forthcoming book *Law of Nations: Legal Order in a Violent World* in which I argue that Trusteeship by the United Nations of the earth’s atmosphere is fully consistent with the fiduciary foundations of the United Nations Charter forged in World War II, as well as with the Law of Nations.

109 I circulated a proposal for several years, until the Copenhagen Climate Conference in 2009, in the UN diplomatic community in New York City a proposal calling for “United Nations Trusteeship of the Earth Atmosphere: The Coming Imperative” which outlines the ideas of a carbon cap, and other ways to stem, slow down or even reverse the rise in the Earth temperature (in the context of the fiduciary international legal order). This proposal, now somewhat outdated, is incorporated into the book manuscript *Law of Nations*, *supra* at 107. During this time, I became convinced that many of these diplomats negotiating the

perhaps a revised carbon cap proposal could work, one that *rewards* those countries that have retained, or who struggle to retain, their rain forests, such as Suriname, Costa Rica and others in the Caribbean basin (as one example).

Yet, the prognosis for such a cap is dim, especially in view of the globe's continuing consumption of carbon, especially by the advanced industrial powers that still use the most carbon based fuels when measured on a per capita basis; yet, such states are using and abusing global commons that belongs to all. These countries' contribution both historically and currently can be roughly calculated; those with the largest *per capita* contributions to global climate change must assume the largest responsibility for monitoring and maintaining the global commons. At best, this requires launching vast technological projects to sequester or ground the carbon that they have recklessly thrown into the atmosphere. At the very least, countries should be encouraged to preserve or plant millions, if not billions of trees, to offset their carbon contributions per capita to the atmosphere. This is only a first, very modest step yet very important since it invites mass citizen participation and awareness.

Second, another idea that now I am convinced must be attempted on a massive scale is carbon sequestration or "carbon grounding" which involves scrubbing the CO₂ out of the atmosphere via very large scale technical means. *This is a process that should be delegated, if even at first symbolically, in a fiduciary international legal order to states that, on a per capita basis, have used the most carbon*, especially the United States which consumes about one fifth of the world's carbon use of fuel. The process of carbon sequestration or "grounding" is also a job producer that is certainly on par with the jobs "produced" by defense industries; in short, if governments can afford the massive military expenditures for supposed security, they can also for very real security from catastrophic climate change afford to pay for this "carbon grounding" process as well. Only very large scale carbon sequestration or grounding efforts will succeed. So, carbon grounding research and development must be greatly accelerated in order to trap and remove as much carbon from the atmosphere as possible in view of the fiduciary responsibilities of current governments to future generations.

A third idea to address this problem is the relentless research and development of energy alternatives, new green technologies and

supposed agreements on climate change were like deer paralyzed by the approaching headlights of their impending doom; in other words, there wasn't much movement occurring.

conservation measures. This idea has been offered since the publication of *Limits to Growth* in 1972 with little discernable progress; even so, efforts in these areas should be continued and accelerated.¹¹⁰ It is unlikely that any one of these ideas, alone, offers an ideal or even operable solution to the danger we confront caused by continuing carbon pollution into the Earth atmosphere. So, a variety of measures by a variety of actors including the United Nations General Assembly must be attempted if climatic catastrophe is to be averted. For in the final analysis, the earth as a whole -- as the only place we know of that has life -- is a sacred trust that we have an obligation to pass onto future generations as it was passed onto us. Such efforts can be helped, if not accelerated, within the context of a fiduciary international legal order.

In particular, as this section has argued, the fiduciary legal order is capable of further growth and evolution in the future; this may well prove to be very useful, if not decisive, in face of the potentially catastrophic effects of climate change and the other “converging crises” of the 21st Century.¹¹¹

The final question is thus: How does this fiduciary legal order relate to, and interact with, the traditional public “state-centric” as well as private international legal orders? The public and private legal orders were traditionally recognized by states and scholars before the advent of World War II, and still largely dominate in international affairs today. How does a fully explicit fiduciary legal order fit into this traditional dichotomy? We will now briefly turn to this issue.

110 DONELLA MEADOWS, DENNIS L. MEADOWS, JORGEN RANDERS. CLUB OF ROME. *LIMITS TO GROWTH*. MIT PRESS, 1972. I read this book in the summer of 1972 as a college freshman and thought “Now we know what to do.” Unfortunately, in the past forty years, we have done little or nothing to curb the dangers outlined in this prophetic book, including the increase of CO₂ in the atmosphere, despite “knowing” and being forewarned. Again, this is simply fiddle-playing while the world burns which seems to be the “new norm” and order of the day—unless we try much harder—hence this section of the essay.

111 The insightful term “converging crisis” is paraphrasing from: JAMES HOWARD KUNSTLER, *THE LONG EMERGENCY: SURVIVING THE CONVERGING CATASTROPHES OF THE TWENTY-FIRST CENTURY*. Atlantic Monthly Press, 2004. Also see the excellent report: “People and the Planet.” Published by the Royal Society of Science, U.K., London, 4/ 2012 which analyses the nature and possible causes of these “converging crises.”

PART IV: A NEW INTERNATIONAL PLURALISTIC ORDER:

As we have seen, a new and fully explicit and evolving Fiduciary Legal Order came into being with the hard-earned victory of the Allies in World War II. Specifically, with the development of the Law of Nations as a consequence of World War II, the traditional dichotomy between public and private international law gives way to a more realistic and *pluralistic* international legal order in which three types of international law inter-relate and interact within and across domestic jurisdictions (See Figure 1, *infra*).

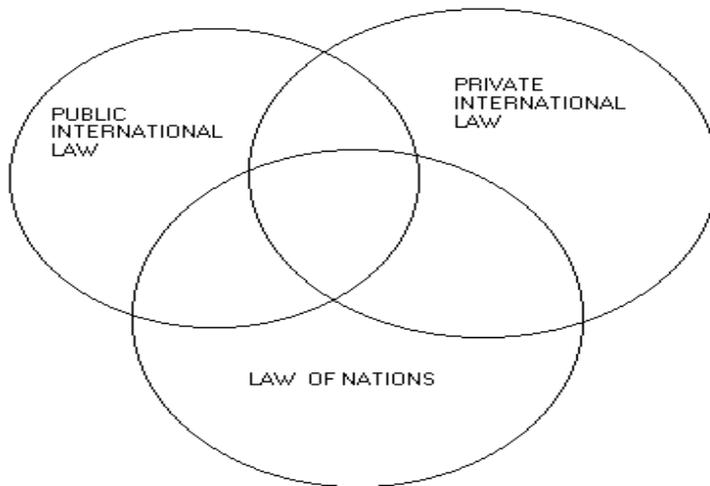


Figure 1: The Fiduciary Law of Nations interacting in a International Pluralistic Legal Order

These three orders of law dynamically diffuse into and interact with each other, yet each generally operates within a distinct legal sphere. Thus, the entire international legal order is pluralistic in nature, and not necessarily monist or dualist.¹¹² Most important, within the Law of Nations there are a plurality of jurisdictions, and not a single overarching “world law.” In other words, as Michael Barkun states, [t]he world is not a one-law world, fervent wishes to the contrary notwithstanding; it is a world of ‘diverse’ public orders”.¹¹³

112 SLOMANSON, *supra* note 10

113 BARKUN, *Supra* note 13

In particular, a fiduciary Law of Nations is not a “western concept” in that it owes its origins in part, to the deep aspirations around the world for self-determination and an end of colonialism, a goal promised by the Atlantic Charter and other solemn declarations in World War II. Thus, the Law of Nations anticipates and incorporates a diversity of legal cultures now interacting within international law. For this reason, it should be called the “Laws of Nations” to reflect the extraordinary diversity of local, national or regional jurisdictions; yet, the term Law of Nations is used here, partly for simplification and especially to recognize the unique legal obligations, norms and relationships that emerged out of World War II.

The concept of “global legal pluralism” accurately though imperfectly captures this phenomenon of a diverse and multifaceted international legal order.¹¹⁴ It is imperfect for three reasons. First, global legal pluralism is a more complex phenomenon than simply the domestic diffusion of international norms across a number of different types of legal entities such as courts, jural communities or transnational jurisdictions. This is much more than a simple conceptualization as a “conflict of laws.” This phenomenon is occurring on a much larger order of magnitude *between entire legal orders*, as well as between and within transnational or domestic jurisdictions. Thus there are sometimes compatible and often competing levels of complexity in the multifaceted interactions between entire legal orders that contribute to global legal pluralism. This complexity is recognized by several scholars in the field who, beginning (I believe) with Sally Falk Moore’s early essays, along with Sally Engle Merry’s wonderful work in the last two decades brought this phenomenon to the worlds’ attention.¹¹⁵

114 There is a rich and rewarding literature on the growing phenomenon of global legal pluralism. See, for example, the many publications of Sally Engle Merry who, (along with Sally Falk Moore) pioneered the idea in the 1980s; her latest contribution is “International Law and Sociolegal Scholarship: Towards a Spatial Global Pluralism,” in a special issue: *Law and Society Reconsidered* in the journal *Studies in Law, Politics and Society*, vol. 41 149-168, 2008. Also see: H.H Koh (1996) “Transnational Legal Processes,” *Nebraska Law Review*, 75, p.181. Finally, for an insightful restatement of the literature on this phenomenon, see Paul Schiff Berman (2007) “Global Legal Pluralism” at Princeton: Program in Law and Public Affairs, Accepted paper Series, paper No. 08-001. Prof. Berman develops an excellent “procedural paradigm” of global legal pluralism that describes the transnational or domestic diffusion of legal norms across national, and often competing, jurisdictions. Finally, for the impact on the judiciary, see: Slaughter, “*Judicial Globalization*,” *supra*, note 68.

115 See, e.g., Sally Falk Moore, *Legal Systems of the World: An Introductory Guide to Classifications.*” (Leon Pipson & Stanton Wheeler eds., 1986). Also See: Sally Engle Merry, *Legal Pluralism*, 22 L & SOC’Y REV. 869, 870 (1988). Finally see, e.g. Berman, as well as Kol at *supra* note 114.

Second, due to the unique nature of certain fiduciary and often non derogatory norms that constitute an important part of the Law of Nations, it becomes important to discriminate more precisely between the types and processes of interactions between legal orders, jurisdictions and courts. Specifically, these processes of interactions can be characterized very generally as the *domestic, transnational or differential diffusion of norms into differing legal orders* as well as national or transnational jurisdictions. Domestic or transnational diffusion occurs when national or transnational courts refer to each other's cases and normative culture or incorporate those laws "common" to legal systems into their own decisions. This type of diffusion is the focus of much of the literature on global pluralism and results in what Paul Berman seems to describe in his excellent essay on global legal pluralism as a "procedural pluralistic paradigm."¹¹⁶

Differential diffusion is largely a vertical process and occurs when international fiduciary norms, such as the "new" *erga omnes* norms are actually recognized, incorporated and adjudicated in domestic or international tribunals.¹¹⁷ Both processes are occurring slowly or rapidly at times, and hence such diffusion occurs episodically since some jurisdictions are more receptive at any particular time to incorporating law from other jurisdictions. Yet, these processes are continually occurring due to increasing globalization, facility of communication (such as the internet) as well as the increasing sophistication and networking of legal elites.¹¹⁸ This gives added, even urgent, emphasis on the teaching and use of comparative research methods in the legal profession.

Third, and perhaps most importantly, there is a *vertical as well as horizontal* dimension to the diffusion of fiduciary legal norms into domestic jurisdictions caused by the advent of the World War II and post World War II charters, norms and innovations; as we have seen, these developments created a Law of Nations applicable to the whole of humanity or, at least, common to most nations and peoples of the world.¹¹⁹ In certain cases,

116 BERMAN, *supra* note 114.

117 *See, e.g., supra* note 9.

118 Slaughter, "Judicial Globalization," *supra*, note 68

119 This assertion of a vertical element in international law contradicts the excellent and now famous article by Richard Falk, *International Jurisdiction: Horizontal and Vertical Conceptions of legal order*, Temple Law Quarterly, 32 (1959), p. 295-320. Falk's excellent article reflects the current and now conventional wisdom concerning the horizontal jurisdiction of international legal order(s). I am suggesting that this is not entirely accurate, especially if national, transnational (regional) or international courts provide remedies to violations of *erga omnes* norms and other fiduciary norms. Judge Garzon's indictment of Pinochet is simply one example.

these new fiduciary legal norms, like the adjudicated crimes of Nuremberg as examples of *erga omnes* norms, can and do preempt domestic legal norms. Such “vertical” or “common” legal norms resulted from the fiduciary promises and pacts of the allies during or immediately after World War II; these can and are being incorporated, without being described as fiduciary norms, into domestic jurisdictions through judicial interpretation, legislative or executive action.¹²⁰

The vertical nature is also due to the collective or shared obligations to enforce the Law of Nations. A central characteristic of the *corpus juris* adopted during and after World War II is the fiduciary and even *collective commitment* to maintain or restore international peace and security. This collective obligation -- meaning first and foremost a *shared* commitment -- is simply the converse of the Charter's legal limits on the unilateral legitimation of political violence, especially since it is coupled with legal obligations, embodied within the U.N. Charter, to enforce collective security measures and sanctions. Hence, the Charter's system of collective security, especially when coupled with the Nuremberg Charter and other post World War II conventions -- that legally limited a state's sovereign right to legitimate political violence -- constitutes the core of a new Law of Nations and international fiduciary legal order. These are the “twin offspring” of the war enunciated earlier by General Taylor; as he states above, if collective security fails, then the Nuremberg Charter and subsequent trials were meant to be the next step to insure that those suspected of violating international peace and security or brought to trial. In short, *a collective or shared obligation means that, if one court fails to act, others are still obligated to do so to bring the guilty to justice, especially when erga omnes norms are involved.* If anything Nuremberg means that *no one is now immune from the consequences of their decisions or actions, even when or especially when acting for a government.* The basic elements for this new legal order consist of the fiduciary norms, obligations, sanctions and institutions created by this World War II *corpus juris*.¹²¹

Evidence of these fiduciary, shared and described here as vertical legal norms and obligations in the modern Law of Nations is most dramatically reflected in the collective, as well as non-derogatory, enforcement aspects of fundamental legal norms, such as the Nuremberg Charter, various human rights regimes, and wartime protections for civilians, the sick, wounded or shipwrecked, as well as Security Council actions calling for collective

120 See Koh, *supra* note 114

121 See *supra* notes 2-11.

security. For instance, the four Geneva Conventions (1949) contain Common Article #1, which states that: “the high contracting parties undertake to respect and ensure respect for the present convention *in all circumstances*.”¹²² This common obligation of all signatory states directly reflects the famous Martens Preamble to the 1907 Hague Convention on the Laws and Customs of War on Land.¹²³

In human rights law, contemporary legal prescriptions concerning individual rights and protections are in the words of the International Court of Justice, *obligatio erga omnes* (owing by and to all humankind).¹²⁴ Regional international courts are recognizing these non-derogatory obligations as well. For instance, in two recent path-breaking advisory opinions, the Inter-American Court of Human Rights held that the remedies of *amparo* and *habeas corpus* are among “the judicial guarantees essential for the protection of rights” made *non-derogable* by Art. 27(2) of the American Convention.¹²⁵

In view of this, a more accurate empirical description of the vertical legal nature of post World War II law is to make fundamental distinctions in the nature of specific legal contractual, state-centric or treaty obligations vs. fiduciary obligations that result from the modern Law of Nations. Such a distinction parallels the legal distinction, found in classical Roman jurisprudence, between *obligatio civilis*, defined as “obligations engendered by formal contracts, or from such portions of the *jus gentium* as had been completely naturalized in the civil law, and *obligatio praetoriae*, or obligations that exist under the Law of Nations.”¹²⁶ As argued above, the latter are or should be self-executing within fully self-determined national jurisdictions as well as transnational or international courts.

Though the parallel is imperfect, the comparison between classical and contemporary definitions concerning legal obligations in international law is revealing; like the classical conception of *obligatio praetoriae*, there are legal obligations, embodied in the unique *corpus juris* recognized after World War II, that are derived from the Law of Nations, as a fiduciary legal order, not solely from subsequent state consent. In particular, a distinction should be

122 See Theodor Meron, The Martens Clause, Principles of Humanity and the Dictates of Public Conscience, 94 AM. J. INT’L L. 78 (Jan. 2000).

123 Ibid.

124 See, e.g., ICJ’s Barcelona Traction Case. ICJ Rep. 1970 3,

125 Advisory opinion OC-8/87 of 30 Jan. 87. Also see LAURENCE BURGOQUE-LARSEN, THE INTER-AMERICAN COURT OF HUMAN RIGHTS: CASE LAW AND COMMENTARY. (Oxford u. Press, 2011)

126 See, e.g., *supra*, note 74.

made in a modern Law of Nations between specific state obligations that arise from express or implied state consent and fiduciary obligations that arise out of collective, non-derogatory legal norms that are a precondition for *legitimate* state authority.¹²⁷

If these *erga omnes* norms are violated, then it is preeminently the role of the courts throughout the world to enforced their governments' collective or shared commitment to the law by holding leaders accountable. In particular, these fiduciary norms must be applied to the most powerful states, and not simply to marginalized or defeated leaders. Less hegemonic hubris infect the very fabric of international law, the victors as well as the vanquished, as Chief prosecutor Robert Jackson so eloquently argued during the Nuremberg trials, must be held accountable in war.

This is true, for instance, for the United States invasion of Iraq where there is compelling evidence that the war was launched despite any hostile or armed action by Iraq towards the United States; in fact, much of the supposed information used to justify the war was allegedly fabricated or later proved false.¹²⁸ In fact, when the issue was brought before the United Nations Security Council (UNSC) in the winter and spring of 2003, the UNSC rejected the United States claim for any justification to attack; yet the U.S. government went ahead anyway, despite having no real *casus belli*, as well as facing large scale domestic and unprecedented global protests.¹²⁹ During the war, there is ample photographic evidence in the public domain that the United States used torture, such as the infamous Abu Ghaib prison

127 See, e.g., supra note 9

128 See, e.g. JOSEPH WILSON. THE POLITICS OF TRUTH: INSIDE THE LIES THAT LED TO WAR (CARROLL &GRAF, 2004). Amb. Wilson also published the famous op-ed piece: "What I Didn't Find in Africa" New York Times. (July 6, 2003). Also see: MICHAEL ISIKOFF AND DAVID CORN. HUBRIS: THE INSIDE STORY OF SPIN, SCANDAL, AND THE SELLING OF THE IRAQ WAR (Crown, 2006. For a study done by a premier former U.S. intelligence official see: PAUL PILLAR, INTELLIGENCE AND U.S. FOREIGN POLICY: IRAQ, 9/11 AND MISGUIDED REFORM. (Columbia University Press, 2011.)

129 This controversy over who has the proper authority to use military force was an example of "authoritative ambivalence," a phenomenon consisting of the institutional conflict within the UNSC between the unilateral and collective legitimating of force that I first described in: "Legitimizing Military Force and Collective Security: The Emergent Role of the Security Council in the Post-Cold War World." PARC WORKING PAPER * 31 Program on the Analysis and Resolution of Conflicts, The Maxwell School, Syracuse University, February 1994. The U.S. failed attempt to get the UNSC to approve its planned war in Iraq is simply the latest and most dramatic example of authoritative ambivalence, a phenomenon that has characterized many of the UNSC debates, especially since the end of the Cold War.

photos; all of those responsible, especially the civilian leadership in Washington D.C. should be held accountable in an national or international court of law. In fact, the net should be cast much wider than at Nuremberg where only the most prominent leaders were placed on trial, while their senior assistants all too often went free, or received symbolic sentences. We should not make the same mistake again in the future. ¹³⁰

In other words, that the very fabric of a state's legal legitimacy is determined by its observance of the Law of Nations, especially *erga omnes* norms, not only to other states, but now to its own people, first and foremost as well. Thus it is ultimately the responsibility of a nation's judiciary to insure that its government and state respect and observe the law. This is admittedly a rare and difficult thing to do. Yet, failure to do so passes this right and shared responsibility to other national or international judiciaries who then have the responsibility, and authority under universal jurisdiction, to bring those guilty of violating the Law of Nations, war crimes and crimes against peace or humanity and other *erga omnes* norms to justice.

130 In this sense, I fully agree with Prime Minister's Fraser's *Forward* to this issue of the Journal. There was a symbolic conviction from a Malaysian "War Crimes Tribunal" but its contents and perpetrators-- largely limited to Bush, Cheney and Rumsfeld -- are too narrowly construed. Other senior officials and aides to President Bush, Rumsfeld, and Vice President Cheney should be scrutinized as well for their possible involvement in the "planning, preparation, initiation or waging of a war of aggression,"—Nuremberg Charter, *supra*, at note 4. Witnesses are readily available; see, e.g. Interview with Col. Lawrence Wilkenson, *Democracy Now* with Amy Goodman, Aug. 30, 2011) as well as for the subsequent war crimes that resulted from the initiation of this unjustified "preventive" war upon Iraq. In fact, the Machiavellian and moral motives seem to coincide for those, within the U.S government and population who opposed the attack on Iraq and argued against the war; the logic seemed clear and compelling. First, *terrorists such as al-Qaeda recruit in the rubble of their victims' over-reactions*; so, any war would end up strengthening the *al-Qaeda*, the primary threat to U.S. interests. Second, since the primary opponent of the United States after 9/11 was "al-Qaeda," an attack on Saddam Hussein's secular Iraq -- a regime that hated "al-Qaeda" for its own reasons -- would destroy a self-policing buffer against the terrorist group, however despicable Hussein was personally. Third, such an attack would remove the primary opposition to Iranian expansion in the area and thus strengthen Iranian hegemony in post war region. Such advice was obviously ignored. Now some of the same individuals from the former Bush administration are urging another "preventive" war with Iran, indicating that there is no learning curve among certain policy makers from the tragedy of Iraq. See e.g., Wilson; Pillar, *supra* note 128. Also see: "The Burden of Proof: Two Former CIA Analysts Talk About The Lies behind Iraq War, HTML format, Thomson Gale Publisher, May 2006. Finally, e.g.: Ray McGovern AND Doug Rawlings, "Addressing U.S. Intelligence on Iraq and Iran." Audio Book. Radio Free Maine, Nov. 10, 2006.

Yet, individual governments or states will often attempt to hoard as much power and control as possible. As a result, there is, and will be, an intense competition in the future within and between these three legal orders—the public, the private and the fiduciary Law of Nations concerning which legal norm or norms should prevail, especially in cases involving the human rights, the environment or war crimes. As such, the differing jural communities and their domestic juridical institutions, if the latter are truly independent, provide the first and most significant safeguard for human rights and the emergent Law of Nations.

CONCLUSION: THE LEVIATHAN AND THE LAW

“People like myself want not a world in which murder no longer exists...but rather one in which murder is not legitimate.”

Albert Camus, Nobel Laureate
Neither Victims nor Executioners

This essay has examined the origins of the new Law of Nations in the promissory declarations and wartime charters -- beginning with the Atlantic Charter -- agreed to by the Allied powers in their initially desperate and eventually successful effort to defeat the Axis powers. These documents were critical in creating the new Law of Nations out of the crucible of the bloodiest war in human history.

World War II was a time of unprecedented mortal danger to the western democracies. The war began in 1939 and, in the first few years, the Axis powers seemed to be winning almost everywhere in the world. So, in response to unique historical, political and military forces interacting as the war unfolded and grew in fury, especially in late 1941 and early 1942, a new fiduciary Law of Nations began to emerge in response to the mortal threats to the Allies caused by Axis aggression and successes. This is not to say that the creation of a Law of Nations was intentional or a deliberate war aim; rather, the Law of Nations emerged and developed due to these several significant forces interacting and reinforcing with each other as the war progressed. In particular, President Franklin Delano Roosevelt and his Administration was determined to articulate a set of war aims from the very beginning, even before America's official entry into the war promising in deed what President Wilson was only able to deliver in word -- self-determination and human rights for all peoples. The Allies, eager for American participation in the war in Europe, agreed with these principles that set the stage for the subsequent emergence and evolution of a modern Law

of Nations. It was the hopes of the Allied leaders and peoples that these legal innovations or declarations would help prevent the emergence of another lawless leviathan, like the horrible Nazi regime in Germany, from emerging in the future.

The ideas of John Locke as developed in his *Second Treatise* help to define and describe the fiduciary nature of these wartime declarations and promises; specifically, Locke describes governments as simply trustees who must preserve the rights of the people who are both the trustors and beneficiaries of this fiduciary arrangement. Locke believed that the people take the initiative, once they have left the state of nature via the social contract, to create a government as a fiduciary trust. As such, Locke theoretical scenario differs from the actual historical circumstances that governments found themselves in during World War II in which they initiated the promissory declarations and documents that, in effect, were made to their own and other peoples in order to mobilize them by the millions to fight and win the war. In doing so, the governments became the trustees of these “promises made” once the war was finally won. As in Locke theoretical scenario, the people of the world become both the trustors and the beneficiaries of the new fiduciary obligations, duties and norms that resulted and characterized in this essay as a new Law of Nations.

Modern human rights law has its origins in these same legal developments, especially in the fiduciary promises made by governments to their own and others people during the darkest times of the war. The United Nations Charter, a treaty binding on states, partially redeemed these promises by recognizing human rights on the international level. In other words, modern international human rights law largely has its origins in the new fiduciary norms recognized by governments during the war, and as such, exists independently of the UN Charter. From now on, the people or nation and its courts, as an independent jural community, are the *imperium et imperii* or ultimate source and beneficiary of human rights in international affairs.

So, I am specifically arguing that the very fabric of a state’s legal legitimacy is determined by its observance of the Law of Nations, especially *erga omnes* norms, not only to other states, but now to its own people, first and foremost as well. Thus it is ultimately the responsibility of a nation’s judiciary to insure that its government and state respect and observe the law. This is admittedly a rare and difficult thing to do. Yet, failure to do so passes this right and responsibility to other national or international judiciaries who then have the responsibility of bringing those guilty of

violating the Law of Nations, war crimes and crimes against peace or humanity and other *erga omnes* norms to justice.

As a result of these developments, a pluralistic international legal order was established in the wake of World War II that consists of the traditional state-centric intergovernmental law, private international law and a new Law of Nations common to the whole of humanity. How these different legal orders diffuse across their “borders” and interact in the future is the fruitful subject of further research. Current trends suggest that the domestic and differential diffusion of fiduciary and international norms across and within different jurisdictions will strengthen the scope and significance of the Law of Nations in the future.

Yet, governments can sometimes be tenacious beasts so the progress of human rights law as part of the Law of Nations will always be tenuous, and problematic, especially at first. If the past is precedent, states will unquestionably seek to maximize their own, unregulated power so in the coming years, there will be a tremendous struggle in each unique jurisdiction of a people between preserving the unchecked power of the state vs. recognizing anew the fiduciary and international rights of the human being. As part of this struggle, even the mere existence of a new Law of Nations will be hotly contested and even denied. As such, this struggle, which has already commenced, will continue far into the future as the state seeks to break out of the legal limits imposed by the World War II revolution in the international legal order, while the people or nation of each jurisdiction attempts to reaffirm and recognize anew the rights that they possess in common with all other nations on the earth.

So, a contest between raw power and the rule of law will be waged even as the world faces unprecedented challenges due to climate change, and the other “converging crisis” of the 21st century.¹³¹ As we have seen, the judiciary of national and international jurisdictions has a critical role in ultimately deciding the scope and significance of the Law of Nations created in the bloodiest war in human history. In particular, the national courts of each unique jurisdiction and its people as distinct jural communities must uphold the Law of Nations in their own and other lands. Thus, the current and future judges in national, transnational or intergovernmental jurisdictions represent our last, best hope and may hold the keys to victory in the ongoing struggle between the ageless Leviathan and the law.

131 See, *supra*. note 111.