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## Words and Apples: The Ladder Approach in Judicial Decision Making\*

C.G. Bateman

In the first half of the twentieth century, American legal realists captured the imagination of the juridical world with the startling revelation that a judicial decision was the epicenter and not merely the outcome of the law.<sup>1</sup> Jerome Frank indicated that everything which constituted the legal process up until the moment the judge spoke the decision were just so many words or contextual variables, but certainly not law in the true sense. Felix Cohen was less ambitious, perhaps, in locating law closer to the rules, and not as far as the decision *per se*, but certainly in those same variables which led to a judge's decision.<sup>2</sup> Later in the century, after legal realism had been designated as the honorary wallflower of Western legal theory, the Natural Law writings of Lon Fuller<sup>3</sup> provoked another clarion call to arms by, perhaps, the last important positivist of this recent era, H.L.A. Hart.<sup>4</sup> As the century came to a close, positivist theories were again displaced by theories more closely adhering to Natural law, such as those of John Finnis,<sup>5</sup> and the Integrity approach of Ronald Dworkin.<sup>6</sup> If positivism continued at all, it did so in the guise of its close cousins, the post modernists/legal realists, who have, often from the grave with the assistance of pilot-fish critical legal theorists, pulled the legal process apart so that it appears as only one large lake of words from which judges

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\*The author extends thanks to his friend and colleague Wenqin Liang who first encouraged him on the clarity and helpfulness of this article towards a better understanding of the rationale for the common law legal system, and the judicial decisions which inhere therein.

<sup>1</sup> Jerome Frank, *Law and the Modern Mind* (New York: Coward-McCann, 1930); Jerome Frank, "Are Judges Human," 80 *University of Pennsylvania Law Review* (1931): 17-53. Karl Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Dobbs Ferry, New York: Oceana Publications, 1981) (1930).

<sup>2</sup> Felix Cohen, "Transcendental Nonsense and the Functional Approach," 35 *Columbia Law Review* (1935): 809-849.

<sup>3</sup> Lon L. Fuller, *The Law in Quest of Itself* (Chicago: The Foundation Press, 1940); "Positivism and Fidelity to Law – A Reply to Professor Hart." *Harvard Law Review* 71.4 (1958): 630-672; *The Morality of Law*. New Haven and London: Yale University Press, 1964.

<sup>4</sup> H.L.A. Hart, "Positivism and the Separation of Law and Morals," 71.4 *Harvard Law Review* (1958): 593-629; *The Concept of Law* (Oxford: Clarendon Press, 1961;1994).

<sup>5</sup> John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).

<sup>6</sup> Ronald Dworkin, *Law's Empire* (Cambridge, Mass. : Belknap Press, 1986).

can fish out what they like and throw back whatever does not fit their particular worldview when promulgating their decisions. I see this state of affairs as both mistaken and unhelpful to both the discipline of legal theory and to the relationship between society and the judicial system generally.

While jurisprudence has never been the same since O.W. Holmes<sup>7</sup> emphasized the fact that the law is fundamentally a dynamic phenomenon, I suggest even he would shudder to see the listless state of legal theory brought on by a hysteria around the indeterminacy of what words mean and what judges are actually doing. Like Holmes and the realists, I too see the judge as one of the most important actors in the growth and life of our laws. Yet, I part ways with the realists as soon as we are told that every piece of constitutional and statutory law which allows the case to find its way to the judge in the first place are merely so many words. I grant such instruments *are* words, but they are important words which only exist in aggregate at the various ascending levels of a, for instance, section, chapter, and whole. Constitutions, for example, are not simply a collection of words to which the judge can ascribe any meaning to, precisely because the words are subordinate to their corresponding sentence, as the sentence to its section, and the section to the whole. Judges serve the all important role of overseeing the engagement of the law with the citizens who live *with* it, not under it. Fundamentally, judges are necessary in the delivery of laws because they “give the sense”<sup>8</sup> of the law to the larger part of society who may well suspect their only contact with it is at its limits: places where there is a dire need for both clarity and some explanation of the benefits or consequences which flow from various courses of legal action. Of course, for every benefit conferred, there is a corresponding consequence for someone else, and *visa versa*, and both parties before a

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<sup>7</sup> O.W. Holmes, “The Path of the Law,” *Harvard Law Review* 10 (1897).

<sup>8</sup> Of course, in the biblical book of Nehemiah, we read that when Ezra read the law to the people, he and others were also there to “give the sense” of what meaning was intended by the words. The relevant verse reads: Nehemiah 8.8, So they read from the book, from the law of God, with interpretation. They gave the sense, so that the people understood the reading (New Revised Standard Version).

judge have the right to be heard, but also to hear. The judge, *inter alia*, ensures both of these things take place. So, in the nomenclature of the realists, yes, judges take “words” from statutes and justify the engagement of them to the parties with more words, but, importantly, they deliver these words in a context of accountability, a context which is authorized by the society in the form of those very same and important constitutional and statutory words.

Judges grapple with the important expressions of our laws at the intersection of the legal and non-legal confluence within Western common law countries. These expressions and their concomitant written underpinnings are important to understanding how law works. I will demonstrate this using a simple metaphor of a person climbing a ladder to reach an apple. In this case, the ladder has five rungs, all of which lead upward to the apple, which represents the point of intersection between the law and the community. The rungs represent logical steps forward in the process of legal decision making, and cannot be skipped at the whim of a judge. The first rung is the constitution of the society in question; second, the statutes or rules which rest on the authority of the constitution; third, the rung representing case law, the tested interpretations of those statutes and rules; the fourth rung consists of all those factors and variables – such as the particular facts of the case, the unwritten principles of justice, and the voices of both sides of an action – which make up the judges decision; the fifth and final rung is the decision itself, which allows the metaphorical judge to bring the apple of outcome down from the tree to those who partake of it, on a ground level, where the legal decision engages with society in substantive ways: hence, the apple is eaten and aids the subsistence of the community who engage it. The important consideration for this metaphor is that rungs cannot be skipped or taken out, they must follow in that order or the whole process fails due to lack of both integrity and logical consistency.

Judges serve an instrumental role in Western common law societies by overseeing a kind of “town-hall-gathering” of understanding and responsibility where the participants include the citizens involved, representatives of law’s interpretation (the lawyers and judges), and, even if only by proxy in the written instruments of law, the political representatives of the citizens who have crafted and approved of these laws. Importantly, lawyers and judges are under the strictures of the laws and all they may do is suggest an understanding of these laws which makes more sense given the whole of the judicial enterprise, and this is Ronald Dworkin’s point exactly: that integrity employed by judges involves appealing to the community’s sense of what is, essentially, right and wrong.<sup>9</sup>

The judges, as I have tried to demonstrate, must climb each rung of the ladder as they explain their decisions: they may not skip the constitution, the statutes, case law, context, and reasonable decision. Further, their apples/words must not be under-ripe, bringing an overly literal sense to the law which might have been acceptable in another age; conversely, their apples must not be over-ripe, such as interpreting the law too loosely so that it fits a particular partisan world view. These apples must be ripe so that when they are brought down to the street level for consumption, they don’t make citizens sick but rather add to the healthy development of the whole bodies of those societies in the Western common law world.

If you live in a state like this, when you read about a court’s judgment in the newspapers or hear about it on the news, ask yourself whether it seems like these “ladder approach” considerations – the constitution, the statutes, case law, context, and reasonable decision – are being adhered to. If they are, the decisions are then reflective of the democratic processes of the society to which you belong. If they are not, or if you think the law itself is not reflective of what your fellow citizens would agree with, then you have a

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<sup>9</sup> Dworkin, *Law’s Empire*.

representative in your country's parliament whom you can contact and who can then take your concern to the entire body of your country's representatives for consideration. If enough fellow citizens agree with you, your representatives will be obliged to change the law.



## PARADIGMS LOST AND FOUND? THE EMERGENT INTERNATIONAL LEGAL ORDER\*

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### INTRODUCTION: Paradigm Lost? State Centric International Law

Historical events in and after World War II resulted in a virtual revolution in the current international legal order which became much more differentiated, complex and pluralistic as a result. Most noticeably were the subsequent innovations in the:

- a) Legal and specifically fiduciary norms, duties and obligations and other relationships, between the nation and the state, resulting in a modern Law of Nations to be further interpreted, developed and applied by the relevant courts when necessary.\*
- b) New legal limits on state authority to unilaterally legitimate violence by the state except, as stated in Article 51 of the UN Charter, in cases of self-defense against an *armed attack*; so, if a state blatantly violates this, the post war legal innovations insured, if necessary, domestic or international prosecutions for war crimes to end the Age of Impunity for leaders so that *nemo iudex in sua causa*, or literally, "no-one should be a judge in his own cause;"
- c) One way to prevent the state from being the "judge of its own actions" such as armed attacks or aggression is the Nuremberg Charter's (1945) innovation of providing for the international legal jurisdiction over individuals accused of crimes committed in the name of the state especially when domestic jurisdiction fails or is unable to do so;
- d) The historic as well as legal recognition of the right to self-determination which a group possesses prior to actual statehood; the establishment of this principle in, first, the Atlantic Charter (1941) and then the United Nations Charter led to the historic wave of decolonization around the world after the war;
- e) The advent of international human rights regimes and other legal protections designed, in large part, to prevent state or sub-state oppression and violence

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\* This article is based on a chapter in the forthcoming book *Advances in International Law: Enhancing the Role of the Judiciary in Enforcing The Rule Of Law*, to be published by Elias Clark in late 2016.

\* See: my essay, Boudreau (2012) 'Law of Nations' J.Juris 285 in this journal.

against human beings either as individuals or groups. The evolving International Bill of Human Rights or Raphael Lemkin's pioneering efforts to create successfully the *Convention on the Prevention and Punishment of Genocide (1948)*, are examples of these profound legal innovations;

- f) Perhaps least expected is the increasing obsolescence of the past legal and political belief that the juridical concept of "domestic jurisdiction" which was an almost impermeable barrier. After the horrors of World War II, this once almost unchallengeable defense by states is now proving to be a very porous boundary that no longer prevents other governments, or courts from judicial or other interventions to protect the domestic populations of an offending state;
- g) As mentioned earlier, the strengthening of universal obligations or common and shared jurisdiction concerning legal obligations in wartime or military occupations, including war crimes and crimes against humanity; the pioneering "Martens Clause" is one older example of this principle; more recently, the shared obligations of the high contracting parties found in common Article 1 of the 1949 Geneva Conventions are further critical examples of such joint or "common" legal obligations that can be adjudicated in international, regional, national or indigenous courts;
- h) As argued in my preceding essay "Law of Nations" (2012) J.Juris 285, the creation of a new Public Law of Nations that includes the traditional fiduciary legal order concerning the global commons, can and will evolve in the future, as does almost any other legal order. These profound changes simply can't be accommodated, without reductionist simplifications, in the old paradigm of international law consisting largely of norms, agreements or recognized practice between sovereign-states.

Since World War II, legal scholars have struggled to capture and define the nature and scope of these legal innovations,<sup>1</sup> caused by the massive deaths of human beings across much of the globe, culminating in the unparalleled horrors of the

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<sup>1</sup> For instance, there are various alternatives proposed by Ruti Teitel, (2013) 'Humanity's Law' Oxford University Press; Reprint edition (May 1, 2013); Anne Marie Slaughter's "New World Order,"; The emergence of the Responsibility to Protect (R2P) doctrine as well as the revival of natural law theories within international law advocated by Jeremy Waldron and others. Alternative paradigms include post war legal developments being described by David Scheidemann and Ernst Petersman as the new international "Constitutionalism" in economic matters. Finally, there is the new paradigm offered here of a new law of Nations. Thanks to Prof. Jose Alvarez for these references.

Holocaust.<sup>2</sup> Such unimaginable atrocities and human losses cried out for political, moral and legal prescriptions and condemnation, coupled with the immense popular demand that such a war never be faced or fought again...

So, even as the war was being waged and as the human costs of the war continued to climb, the Allied powers promised in the Moscow Declaration in 1943 to create a new international organization, The United Nations, to help preserve the peace and protect human rights after the war was won. (Such an organization was clearly implied but—due to President Roosevelt’s fear of the Isolationist influence back home, not made fully explicit in the *Atlantic Charter* back in 1941.)<sup>3</sup> Much blood was spilled between the Moscow Declaration and the near end of the war in the spring of 1945. As a result, a war weary world looked to their wartime leaders and battle tested diplomats gathering in San Francisco in late April 1945 to forge the new Charter of the United Nations that would keep the wartime promises to forge a better world in which such a war could never occur again. Hopes were very high; as one American paratrooper wrote his congressman from France, “We can win this war but you must win the peace.”

This is why almost the entire world was watching the commencement of the UN Drafting Convention in San Francisco in April 1945, including Pvt. Joe Polowsky and his comrades in a U.S. Army patrol driving that morning through German held territory to the River Torgau; this patrol was, in essence, the most advanced Allied troops from the West in Europe.<sup>4</sup> The diplomats and statesmen opened the drafting convention for the UN Charter on April 25 on the same day that Pvt. Polowsky and his comrades linked up with the Russians on the Elbe River deep in the heart of Germany. Despite the dangers, Polowsky and his comrades were keenly aware of the opening on the same day of the UN Drafting Convention several thousand miles away. It was an auspicious beginning.

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<sup>2</sup> See: Peter Longerich, (2010) ‘Holocaust: The Nazi Persecution and Murder of the Jews’, (Oxford Univ. Press Inc.). Also see: Anthony D’Amato,\* (Fall, 1995 /Winter, 1996) ‘Human Rights as Part of Customary International Law: A Plea for Change of Paradigms’, 25 Ga. J. Int’l & Comp. L. pp. 47-98. This essay is a partial answer to Prof. D’Amato excellent challenge and groundbreaking article.

<sup>3</sup> The isolationists were a formidable domestic factor in American Politics – until Pearl Harbor... See, for instance: Lynne Olson, (2013) ‘Those Angry Days: Roosevelt, Lindbergh, and America’s Fight Over World War II, 1939-1941’, *passim*. Manfred Jonas, (1989) ‘Isolationism in America 1935-1941’ [Paperback] imprint Pubns (June 1989). Also: Wayne Cole, (1983) ‘Roosevelt and the Isolationists, 1932-1945’, University of Nebraska Press, pp. 698.

<sup>4</sup> See: (2012) ‘The Law of Nations’ J.Juris 285-352. Also see: Studs Terkel, (1997) ‘The Good War: An oral history of World War II’, The New Press (Reprint edition).

As the drafting of the UN Charter continued, taking several months, the war progressed to its bloody conclusion, first in Europe and finally in the Pacific.

The end result of the San Francisco drafting convention, the Charter of the United Nations, — when coupled with the Nuremberg Charter — marks a virtual watershed in the evolution and development of international law; as already mentioned, these are the, as described by General Telford Taylor, the “twin offspring” of World War II. On particular, the UN Charter is really a hybrid document, consisting of both treaty and trust law, since it’s drafting was clearly one of the wartime promises of the Allied powers made to help mobilize the millions of people needed to win. Since the drafting and adoption of the Nuremberg and UN Charters, as well as the other resulting legal conventions or documents emerging out of World War II, legal scholars and practitioners have struggled at to define a new *and accurate* paradigm of the international legal order that accurately reflects and describes this new and living legal landscape.<sup>5</sup>

Even so, international consensus over any new or controlling definition of the new international legal order will be difficult and will only gradually emerged. These difficulties will be compounded since any such plausible paradigm *must first and foremost describe and explain international law as it has actually and historically developed*. Jurisprudence ignores history at its own peril, and must rediscover the powerful impact of the actual, not simply the abstract, on the living law.<sup>6</sup> This “historical grounding” is critical, especially if the peoples of the world are to finally enjoy the rights so dearly earned during the horrors, Holocaust and very costly battles of that worldwide war.

Specifically, the idea that Bentham’s paradigm of the international legal order as consisting largely of “agreements or practice by states” must be significantly expanded and as well as historically grounded in the profound legal developments since his death; as we saw the Essay “Law of Nations” (2012 J.Juris. 285, the historical and legal innovations and developments triggered by World War II helped to define and describe a new paradigm based upon the fiduciary nature of the Allied powers’ wartime declarations and promises *to their own and other peoples of the world*. In this regard, it should be noted that the British philosopher John Locke describes governments as simply trustees who must preserve the rights of the people who are both the trustors and

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<sup>5</sup> See: *supra*, footnote 1. The final paradigm may well prove to be a fusion of some or all of these efforts...

<sup>6</sup> See for example, Edgar Bodenheimer, (1974) ‘Jurisprudence: The Philosophy and Method of the Law’, Harvard University Press.

beneficiaries of this fiduciary arrangement.<sup>7</sup> Locke's ideas provide a critical insight to the actual history of the war: namely that the Allied governments became the enduring trustees of these "promises made" once the war was finally won. Every principle of domestic law insists that solemn promises, however general, made in *good faith* to others, who then consent and act upon these pledges, must be kept. Thus, the peoples of the world now became the beneficiaries of the resulting fiduciary obligations created by the declaratory and promissory statements of the Allies concerning the purposes of the war. In short the people or "nation" took on extraordinary importance in these promissory statements, declarations and charters made during wartime; the terms "people or "nation" can be defined here as a "jural community" in which members have shared moral and legal obligations to each other, as well as a communal consensus concerning the appropriate dispute resolution mechanisms to be used among them, such as the courts; as such, the depth and extent of these shared legal and moral obligations can be empirically tested. (See Michael Barkun's classic book *Law without Sanctions* (1968) for elaboration of this definition of a "jural community" found first in the anthropological literature.) During and after World War II, such nations took on significant new, meaning and significance in international law. Specifically, the Allies were appealing, in their promissory declarations, to their own as well as other nations, as well as to the conquered, colonial or neutral peoples of the world to make the sacrifices necessary to win the war. As such, the people or nation can no longer be regarded as purely a passive presence, or described merely as a "population" in international law. These promises made to the peoples of the world in such dire times of mortal dangers must be promised kept. Future domestic, international and indigenous courts decisions will have to determine when and how the Allied promises made to millions of their own and other peoples can be construed or constructed as implied, executive, enduring trusts that belong to the people or nations of the world, and not to the state.

This actual historical account differs from Locke's *Treatise* in significant ways. Most importantly, Locke believed that the people themselves 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 historical circumstances that governments found themselves in during World War II in which they

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<sup>7</sup> John Locke, (1980) 'Second Treatise of Government', C.B. Macpherson ed., Hackett Publ'g reprt. Also see: A. John Simmons, (1995) 'On The Edge Of Anarchy: Locke, Consent, And The Limits Of Society', Princeton Univ. Press reprt. Finally, see: William Ebenstein, (1969) 'Great Political Thinkers: Plato to the Present 120', Holt, Rinehart & Winston 4<sup>th</sup> ed. Locke's definition of property that includes one's life, liberties and what today we would construe as rights.

initiated the promissory declarations and documents that, in effect, were made to their own and other peoples. These provided the “seeds” of the “promises to keep” by governments and courts that were to later grow and flourish, if the war was first won. If so, as in Locke theoretical scenario, the people of the world become both the *trustors and the beneficiaries* of the resulting 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. For instance, the United Nations Charter, a treaty binding on states, partially redeemed these promises by recognizing human rights on the international level. Coupled with the Atlantic Charter, also cited and “subscribed to” in the Declaration of January 1, 1942,<sup>8</sup> these promissory documents were the very beginning of the Law of Nations that was, with coming victory, to reach its partial fulfillment in the Charter of the United Nations.<sup>9</sup> In particular, the Atlantic Charter recognized as a war aim of the allies the right peoples to self-determination. The Nuremberg Charter gave added rights and protections to peoples defined as a group, if attacked. Due in part to these developments, forged in the agony of the greatest war in human history, the Law of Nations emerged as an *independent legal order that now, among other things, represents a law common to humanity and governs the relationships between the state or government and its own as well as other peoples.*

As such, the people or nation and its courts-- as an independent jural community or civil society -- are the new *imperium et imperii* or ultimate source as well as beneficiary of the norms of self-determination, human rights, and collective security in international affairs. Most importantly, as mentioned earlier, the idea that other states or judicial institutions *can't intervene* in the “domestic jurisdiction of an offending state no longer legally “excuses” a state from outside international or judicial scrutiny. Simply stated, domestic courts can't surrender their common and shared jurisdictions over the Law of Nations to the servile excuse that the case presents a nonjusticiable political question. Furthermore, as Prof. D'Amato and other legal scholars point out many of these developments (See footnote 2, *supra*), especially in human rights, are now entrenched in customary international law as well. For instance, modern international human rights regimes have much of their origins in the new fiduciary norms recognized by governments during and after the war. In the future, it will be up to individual courts and different domestic, international, regional or indigenous jurisdiction to give these legal

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<sup>8</sup> See: ‘Law of Nations’, (2012) J.Juris 285.

<sup>9</sup> See: ‘Law of Nations’, *supra*.

norms and protections continual if not greater life and meaning when applied to new and complex challenges confronting individuals or groups as a whole, especially if they are under violent attack by states, sub state actors or terrorists.

In short, the World War II legal developments unquestionably resulted in a profoundly significant seismic shift in the legal landscape of international law or related norms, obligations and relations. In this book *The Structure of Scientific Revolutions*, Thomas Kuhn describes such profound changes as “paradigm shifts” in the prevailing worldviews of the theorists, scholars and practitioners in a particular field.<sup>10</sup> The preceding analysis throughout this chapter argues that, in effect, the old paradigm of “state-centric” international law is simply inadequate to describe the historical and legal developments ushered in by World War II. Indeed, the old paradigm is lost at sea, metaphorically speaking, and can’t seem to find the necessary maps needed to navigate the accurate way back to a safe harbor in the profoundly changed coastlines and landscape of the new legal world.

### **Blackstone and Bentham: The Oxford Opposites on the International Legal Order**

At such a moment, it is possibly very helpful, even necessary, to remember the defining characteristics concerning the old paradigm or map of international law. Specifically, we have to ask and briefly explore the question: How did the prevailing paradigm or “map” of international law as consisting largely of “agreements between states” originate? In his book chapter on Blackstone and Bentham, Mark Janis has tried to answer this by conducting a remarkable study on the competing versions of William Blackstone and Jeremy Bentham in late 18<sup>th</sup> century England concerning the nature of the international legal order.<sup>11</sup> Janis points out that, in the period from 1765 to 1769, the great English jurist William Blackstone wrote his famous legal *Commentaries* in which he defined the Law of Nations as one that *municipal courts could engage and decide upon*, stating:

“The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world;<sup>1</sup> in order

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<sup>10</sup> See: Kuhn, T.S, (1962) ‘The Structure of Scientific Revolutions’, Chicago: University of Chicago Press.

<sup>11</sup> See: Mark Janis, (2010) ‘America and the Law of Nations’, Oxford: Oxford University Press, pp. 1-15. Also see: Willem Theo Oosterveld, (2015) ‘The Law of Nations in Early American Foreign Policy: Theory and Practice’, Brill Publ.

to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance frequently occur between two or more independent states, and the individuals belonging to each.<sup>2</sup>This general law is founded upon this principle, that different nations ought in time of peace to do one another all the good they can; and, in time of war, as little harm as possible, without prejudice to their own real interests.<sup>3</sup> And, as none of these states will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those principles of natural justice, in which all the learned of every nation agree: or they depend upon mutual compacts or treaties between the respective communities; in the construction of which there is also no judge to resort to, but the law of nature and reason, being the only one in which all the contracting parties are equally conversant, and to which they are equally subject.”<sup>12</sup>

In Blackstone’s definition, the Law of Nations includes, and applies equally to, “states,” “individuals,” “nations,” and “all contracting parties.” This is defining the subject matter of the Law of Nations in large “broad-strokes” with potentially expansive application. Most importantly, later in the same passage he gives a critical role to the “common law” which often requires the courts or a “municipal” or domestic court, in adjudicating important aspects of the Law of Nations. As we shall seek, this is a critical component in a modern Law of Nations as well, and so far seems to be happening by the diffusion of legal norms across national jurisdictions, not by any pure adherence to a doctrinaire definition of “international law”. But then, rather unfortunately, Blackstone emphasized the uncertain role of “natural reason” in deducting and discerning the role and reach of the Law of Nations. In fairness, by doing so, Blackstone was simply trying to follow in the footsteps of past influential jurists such as Suarez, Wolff and Vattel.<sup>13</sup>

Yet, by doing so, and trying to establish the origins of the relevant law in “natural reason,” Blackstone’s definition of the Law of Nations lacks any historical specificity and, more importantly, limiting legal precision. Specifically, his system of law is guided by the law of nature and “natural reason”—not actual historical legal developments, actual texts, historic Charters, or promissory declarations. Defined in this way,

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<sup>12</sup> Blackstone, Book 4, Chapter 5, Of Offenses Against the Law of Nations. quoted in Janis, op. cit., p.9

<sup>13</sup> *Ibid.*, Blackstone specifically states: ‘therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land’. Also see: T. Hochstrasser (Editor), P. Schröder, (Editors), (2003) ‘Early Modern Natural Law Theories: Context and Strategies in the Early Enlightenment’, International Archives of the History of Ideas Archives internationales d’histoire des idées [Hardcover]. Springer; 2003 edition.

Blackstone's definition of the Law of Nations seems rather vague and all-inclusive. As a result, a perceptive Oxford student listening to one of Blackstone's lecture, the young Jeremy Bentham, was intensely dissatisfied with Blackstone's definition. Trained as a lawyer (though he never practiced), Bentham believed that the relations between states and nations needed greater clarification and reform.

So, perhaps not surprisingly, only twenty years later in 1789, David Bentham coined the term "international law" and defined it in the following very rigorous terms: "There remain, then, the mutual transactions between sovereigns, as such, for the subject of that branch of jurisprudence which may be properly and exclusively termed international..."<sup>14</sup>

Bentham perceived his new contribution in terms of a reformist agenda that he aspired to apply to law in general; the happiness or the greatest good for the greatest number could be obtained when the sovereign's right to rule was recognized; so by insuring the rule and authority of the sovereign, domestic peace could presumably be best preserved.<sup>15</sup> Yet, in defining international law in this way, Bentham totally rejects the relationship between the sovereign with its own and other peoples as a source of needed regulation, let alone law, and thus exempts this critical relationship, including the colonial one (perhaps unwittingly), from judicial review.

The problems with this definition of international law became almost immediately apparent; for instance, because of Bentham's definition, customary law became almost instantly an "orphan child" of international law since it clearly is not often initially the result of a simple agreement between sovereigns, except in a secondary and derivative form as "state practice." Yet, if customary law is relegated to merely state practice, this unfortunately results in a greatly diminished and deformed definition since so many rich and enduring examples of customary law existed among peoples, or the "powers and principalities" prior to states, or statehood, and still exist –despite the advent and ensuing "state practice" of total war in the 19<sup>th</sup> and 20<sup>th</sup> centuries.

So, in contrasts, customary law is best understood as a traditional practice of the people that is subsequently "recognized" or tolerated by Empire, Kingdom or later, a

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<sup>14</sup> Janis, *supra*, footnote 11, p 13. Also see: Bentham, Jeremy, (1789) 'An Introduction to the Principles of Morals and Legislation', London: T. Payne.

<sup>15</sup> Janis, *op. cit.*, pp. 10-20.

state. For instance, I would argue that customary law concerning the protection of ambassadors, places of worship, the wounded or imprisoned, or even hospitals or schools, don't disappear simply because state practice or terrorists, or both, have seen fit to increasingly slaughter such protected individuals or decimate such protected places with increasing regularity, ferocity and self-rightness. In short, left stranded under Bentham's conception of international law, customary law all too often becomes simply what fits into the eye of the beholder.<sup>16</sup>

Yet, even as an 'orphan,' customary law is still recognized as a main source of international law— the first of what Thomas Kuhn calls evidence of an episodic exception, in this case, in the Benthamite paradigm of international law; there will be many more. Nor is there any room in Bentham's definition for the role or rights of the people on an international plane—*unless* agreed upon by power-seeking sovereigns or states; hence, if using a strict definition of Bentham's definition, human rights are essentially given or "recognized" *only* by the state, a clearly unacceptable practice or idea except perhaps to dictators.<sup>17</sup>

Furthermore, the whole idea of trusts or solemn promises between a government and its own and other people as a source of international legal obligations becomes *by definition* "impossible" as well—even though such solemn promises made within a domestic society would be recognized and respected as a legal and "fiduciary" obligation by most law-biding jurisdictions around the world. Most importantly, after Bentham, the "people" or nation became purely a passive presence in the definition of the state or international law, and had very little independent legal recognition until the subsequent upheavals and wars of the twentieth century.<sup>18</sup>

Finally, and most important at the time is that Bentham's conception and definition of "international law" had, perhaps unintentionally, enormous global import in terms of legitimating European control of their colonies. As Anthony Anghie argues in

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<sup>16</sup> See, for instance, Anthony D'Amato, (1987) 'Trashing Customary International Law', *The American Journal of International Law*, Vol. 81, No. 1 (Jan.), pp. 101-105.

<sup>17</sup> A Stalin would never agree with the reasoning, say, a Jefferson or, for that matter, Locke. See, for instance: Leo Strauss, (1965) *Natural Right and History* (University of Chicago Press).

<sup>18</sup> Jeremy Bentham ordered his body embalmed, and his head set upon a tray, after this death; his embalmed "presence" still graces a closet at the University of London, which he helped to found. I simply suggest that his definition of international law is now—in view of historical developments since his death—as disembodied now as well.

his book *Imperialism, Sovereignty and the Making of International Law*, international law-- as defined by Bentham and further shaped by John Austin--was uniquely suited to favor the Europeans in their “colonial confrontation” with the peoples in the rest of the globe.<sup>19</sup>

In particular, the rebellious American colonies at the time were influenced by, and even quoting Vattel and Blackstone, in their rationale for independence.<sup>20</sup> For the European colonial powers, jealously guarding their vast colonial acquisitions overseas, this simply wouldn't do. The American Revolution was undoubtedly a warning, if not a wake-up call, concerning the importance of NOT granting legal power and legitimacy to groups of peoples, such as colonies or their limited provincial legislatures designed to provide very limited “self-government.” An alternative, more limiting definition had to be found if further colonial uprising were to be legally delegitimized and outlawed from the very beginning of any future potential or real unrest...So soon this limiting and scholarly definition of Bentham's found favor and acceptance in most the ruling courts and capitals in Europe, and slowly but surely elsewhere.

In short, as argued by Anthony Anghie and others, the prevailing normative narratives had to fit the political practices of profit and power valued by the emergent European colonial states; in particular, international law so narrowly conceived as Bentham as the law created by sovereign-states privileged the political practices of the European states then subjecting most of the world “peoples” to colonialism, and made their colonial power and hence jurisdiction more absolute.<sup>21</sup> In particular, oppressing or exploiting an entire people—the essence of colonialism-- then became a matter of “domestic jurisdiction” and not subject further by other “states.” Thus, this paradigm of concentrated state power and control lasted until the “nation- state” reached its murderous and extreme expression in Hitler's Germany.....

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<sup>19</sup> Anthony Anghie, (2004) ‘Imperialism, Sovereignty and the Making of International Law’, University of Cambridge Press.

Also see: Dirk Moses, (2008) ‘Empire, Colony, Genocide: Conquest, Occupation and Subaltern Resistance in World History’, Berghahn/Oxford (editor). Finally, see: Carl Schmitt, (2003) ‘Nomos Of The Earth’, *The International Law Of Jus Publicum Europaeum*. (G.V. Ulman trans.).

<sup>20</sup> See: Janis, *supra*, footnote 11. Also see: Carl Schmitt, *supra*. Also see: Julian Waterman, Thomas Jefferson and Blackstone's Commentaries, (1932-1933) 27 Ill. L. Rev. 629. Finally, see: the magnificent Homi K. Bhabha, (1994) ‘Of Mimicry and Man: The Ambivalence of Colonial Discourse,’ in *The Location of Culture*, pp. 85-92. Prof. Bhabha's idea of the Europeans colonizing and policing even the once autonomous peripheries of other cultures through contrasting narratives and implicit normative frameworks is fascinating, and to the point.

<sup>21</sup> *Ibid.*, footnotes. 19 and 20, *supra*.

In short, Bentham's "state-centric" definition of international law proved to be very "utilitarian," at least for the European colonial powers, during the ensuing years that represent the height of European colonial empires overseas. As such, this convenient "colonial" definition of "international law" largely persisted even beyond World War I until the advent of the Nazi state and the subsequent outbreak of World War II. The ensuing massive crimes of the Nazis against their own and others peoples, culminating in the unimaginable terror of the Holocaust shattered, or should have shattered, forever the prevailing paradigm of international law as only those obligations and agreements voluntarily accepted or "practiced" between states.

In this regard, as we have seen in the "Law of Nations"(2012), President Roosevelt deliberately insured such an anti-colonial outcome to the war when he insisted on this point as a preeminent war aim in the Atlantic Charter, which became the condition for the United States entry into World War II. By the President's deliberate design, this moment-- August 1941--when the Atlantic Charter was signed and the United States was still at peace--became the real beginning of the end of the European colonial empires. This guaranteed that, after the war, the peoples or nations of the state could no longer be simply a mere matter of "domestic jurisdiction." Practically all of the legal innovations of World War II and afterwards were aimed at recognizing the fights of peoples to 'self-determination," the saliency of human rights, ending the unilateral use of force, and thus insuring the impossibility of such legal reification of state power, which reached its horrific apotheosis in the Nazi regime.

So, Bentham's definition has a compelling simplicity that fit the times and seemed to suffice for decades until the lawless leviathan of Nazi Germany emerged that sought to do everything to its own or other peoples under the fake, indeed profane, pretenses of "legality." When the World War came, the Nazis made unprecedented massive war simultaneously on domestic "populations," – including their own people, especially Jewish Germans. Simultaneously, they made war upon entire peoples that they had captured, culminating in the murderous Holocaust, which subsequently horrified the world, as well as the fighting Allied soldiers who liberated the skeletal survivors of the death camps.<sup>22</sup>

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<sup>22</sup> See *supra*, Footnote 2. For instance, on a personal note, when I was quite little, I had a friend, Peter Hewitt, whose father had liberated a death camp while the latter was a captain in the US Army in Europe during World War II. My friend's father had trouble sleeping at night, and would never talk to us about

In view of this unprecedented agony and horror of the war, the people or nation could simply not be regarded as a passive presence in international law, merely within the domestic jurisdiction of a sovereign state. Many of the legal innovations made during and after the War were intended precisely to protect such civilian populations as well as punish the perpetrators who attacked them. Thus, a people or nation, as well as individuals, now have an enduring and inviolate standing under international law--as they imperfectly did in Blackstone's conception concerning the Law of Nations.

Much of the post war legal innovations and developments were implemented with this goal clearly in mind; for instance, Raphael Lemkin's almost solo and heroic efforts to have the Crime of Genocide prevented and punished, as discussed above, is a profound case in point.<sup>23</sup> So, in view of actual historical developments during World War II, *an adequate definition of international law became necessary that incorporates and protects the peoples of the world from the violence of their own or other governments, and even from other sub-state actors.* The rights of the people or nation, as well as the human rights of the individual, could no longer be sidelined or even ignored; *in particular, the legal obligations and relationships, duties and norms created by a government when it makes solemn promises to simultaneously its own and others peoples must now be recognized as part of international law.* It was out of the vast and utter agony of World War II that the Public Law of Nations, as a fully emergent legal order, was born.

This obviously complicates the once simplified international legal landscape that Bentham's definition of international law conveniently provided to European colonial

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what he saw—though we were all very proud of his service, though we didn't quite understand why or what happened at the time, as we now do, concerning the vast, murderous magnitude of the Holocaust...

<sup>23</sup> See: 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, (2008) Palgrave Macmillan. Herbert Hirsch, (1995) 'Genocide and The Politics Of Memory', Chapel Hill: University of North Carolina Press). Finally, see: Irving Louis Horowitz, (1976) 'Genocide: State Power And Mass Murder', Transaction Books. 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.

powers. In the wake of World War II, a more accurate definition of this new international law is obviously needed to account for the profound and complex legal developments during and after the war established within the state, and between nations and their governments. In view of this, with due diffidence to Occam's razor, the simplest answer may not be the best, as modern algorithms attest; in particular, too much is cut out and lost if we continue to accept Bentham's overly exclusive definition of international law as consisting of only those agreements between sovereign states; this simply isn't accurate any more in view of the legal innovations, developments and realities that have occurred since Bentham and the 1780s, during the European colonial era, that was to finally die in the agony and aftermath of World War II.

### **Paradigm Found? The International Legal Order**

As argued above, a new and fully explicit and evolving fiduciary Law of Nations came into being with the hard-earned victory of the Allies in World War II, the greatest war in human history. The legal innovations that occurred or culminated during this bloody period almost completely shifted the sole sovereign center of magnetic force in the international legal order from the state to include the nation, group and the individual. As the war and its aftermath—both historical and legal—made clear, the individual nor the “nation” could no longer be excluded from international law and its protection.

Because of this decisive expansion of international legal norms, *the current international legal order must be able to incorporate the competing visions of Bentham state-centric law as well as Blackstone's earlier emphasis on the subjects besides the states; Blackstone also emphasized. In effect, the authority of municipal or domestic courts —i.e. “the common law” - to adjudicate the “law of nations.”* According to his understanding, courts didn't automatically hide behind the servile shield of a nonjusticiable political question. Under a renewed Law of Nations, each unique case must be weighed on its own legal merits by the court.

A partial synthesis of the two men's visions is possible and, in view of historical and legal developments, even necessary. Since “states” as such seem to be here to stay, the seemingly incompatible versions Bentham as well as Blackstone's specific role for domestic judicial decision must be integrated into a new paradigm and practice of international law; such a paradigm must include the actual historical and legal evolution of the international legal order during and after World War II; in particular, the creation

or recognition of international law can no longer be defined simply in terms of “states” and thus evade a historically adequate and legally accurate definition of the International Legal Order as it now exists. As stated in the essay “Law of Nations,” the new law applies to peoples or nations as whole, as well as directly to individuals in terms of human rights or liability --i.e. Nuremberg-- as well as to states; thus, if any individual attacks another individual, group or a nation, he or she can be liable and tried for war crimes and, if the facts fit, be charged with Crimes against Humanity or Peace as well. These innovations simply don’t “fit” into Bentham’s conveniently “colonial” conception of inter-state law, except as ancillary or almost historically accidental events. As we have tried to argue throughout this essay, such an antiquated understanding of international law is simply no longer adequate or accurate to our current world.

In particular, Bentham’s definition of international law no longer explains the profound legal protections given to groups, such as in the Nuremberg Charter and trials, or to individuals, as expressed in the very first Article of the UN, which recognizes human rights, and subsequently reflected in the development of the International Bill of Human Rights.<sup>24</sup> In contrast, the fiduciary Law of Nations clearly and consistently recognizes such peoples or nations as preeminent and provides the punishment for any individuals attacking any individuals, peoples or nation so defined, makes it an international crime of the first import. There is simply no legal consistency in Bentham’s conception of international law concerning these issues – existing as essentially agreements between sovereign states-- unless one simply argues that such protections, rights duties and punishments are essentially *gratis*, or the agreed upon as *gifts* of the state.

So, now there are, at the very least, *twin poles in international law*—the state and the nation co-existing in an often-uneasy alliance that is sometimes almost seamless and at other times is actually torn asunder by growing abuses, aggression and even atrocities by the state when it violently attacks its own or other peoples. In fact, much of the violence in the world today is internal to the state; part or all of the people may rise up against the

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<sup>24</sup> See: Universal Declaration of Human Rights, G.A. Res. 217A at 71, U.N. GAOR, 3d Sess, 1<sup>st</sup> plen.mtg., U.N. DOC A/810 (Dec. 12, 1948); see also: Johannes Morsink, (1999) ‘The Universal Declaration Of Human Rights Origins, Drafting And Intent’, Bert B. Lockwood, Jr., ed., Univ. of Pa. Press; see also: Mary Ann Glendon, (2002) ‘World Made New: Elenor Roosevelt and the Universal Declaration of Human Rights’, Random House Trade Paperbacks; 1st edition (June 11). Finally, see: William R. Slomanson, (1990) ‘Fundamental Perspectives on International Law’, Wadsworth Publ’g Co. 6<sup>th</sup> ed. which provides an excellent overview and summary concerning the contents of the International Bill of Human Rights Law. Also see: UN GA resolution A/RES/543(VI). Also see: D’Amato, *supra*, footnote 2; In short, human rights are no longer nonjusticiable political questions.

government and state and thus launch a civil war. These conflicts too now have international protections. The actual legal, political and diplomatic history of World War II is decisive in this regard; the demand for a new definition of international law is belated acknowledgment of this need to recognize the *actual historical political, military and legal realities and developments of that war*...The atrocities committed in World War II, culminating in the Holocaust, simply had no precedent or parallel in modern human history; as such, the survivors of that war tried to construct enduring international structures and innovative court procedures--reviewed earlier in this Journal in the essay "Law of Nations" (2012) for legal protections and interventions so that no such horrible events could happen again. The emergence of a public and fiduciary Law of Nations was an unintended but perhaps inevitable result of these historic events.

In short, there is an entirely new international legal landscape that requires a new conceptual map, a new paradigm, in order to navigate and adjudicate successfully in domestic as well as international jurisdictions. Because of this, the time is overdue to reframe our explanation of this new and complex international legal order, its sources and ensuing judicial practice from Bentham's rather narrow definition of "international law."<sup>25</sup> So, the term "International Legal Order" is used here rather generally to indicate these new norms, relations and practice are generally intended to apply to much more than the traditional conception of international law; in this sense, it is an expansive, pluralistic and certainly not exclusive term that indicates the focus is beyond state-centric law and the many uniquely local matters of *domestic* jurisdictions.

Influenced (in part) by the work of Hatfield and Weingast, the new international legal order can be generally defined here as a public regulatory process supervised by a decentralized enforcement regime (the domestic courts, the ICJ, the ICC, and in the final analysis, by the UN Security Council) that shares four attributes: a) *normative classifications of behavior that have originated in and historically developed by independent domestic, regional, indigenous or international court, jurisdictions or actual national practice*; b) in turn, such normative classifications are the historical and cultural product of a *public reasoning process* which usually originates at the domestic or international level; to be fully public, such a process is always open and subjected to individual as well as legal interrogation, including judicial review; c) *Compliance comes out of a pre-existing social and procedural consensus* that obedience is in the best interests of, and sanctioned by the parties and peoples actually involved, as

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<sup>25</sup> See Janis, *supra*, footnote 11, pp. 12-3.

reflected in traditional or legislative action; d) and *wrongful actions carry a specified penalty* of some sort that can be addressed through a series of decentralized enforcement mechanisms ranging from self-restraint or sanctions to the formation of criminal investigations or even—in the most serious and deadly disputes- collective security actions by the UN Security Council.<sup>26</sup>

In short, this is law within a legal order that is not primarily defined in terms of negative sanction or coercion; many, if not most people want to obey their domestic law in order to further their own life goals and ambitions, as well as to safeguard their family or property. In other words, people follow the law because they want to and see it as part of their inherent moral code and social obligations. As Prof. Michael Barkun states in his classical study *Law Without Sanction: Order in Primitive Societies and the World Community*:

In summary, then, the utilization of coercive sanctions is hemmed in by limitations: by the insufficiency of resources, the ambiguous relationship with deterrence, and by the minority character of deviance...Two important consequences follow from these considerations. First, coercive sanctions need not be the mainstay of the law in as much as the vast number of social interactions never seem to invoke them or to be due to their presence. To limit law solely to instances in which sanctions are applied...is to reduce it to social pathology. *Second, the [social and] procedural consensus upon which sanctions are based is perceived to be ideologically and perhaps temporally prior to the use of force.*<sup>27</sup> (Emphasis Added)

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<sup>26</sup> There are, of course, a variety of competing definitions, of a domestic or international “legal order;” see for instance: Hans Kelsen, (2009) ‘A Pure Theory of Law’, The Lawbook Exchange, Ltd. (June 30). Despite what I consider the severe shortcomings of Kelsen’s theoretical approach, I want to pay homage to his tireless work, even as World War II waged, to bring Nazi warlords and criminals to justice. For a contrasting definition of legal order see: Claudio Grossman & Daniel D. Bradlow, (1993) ‘Are We Being Propelled Towards a People-Centered Transnational Legal Order?’, *American University International Law Review*, vol. 9, no. 1. Also see: Philip M. Moremen, (2006) ‘National Court Decision as State Practice: A Transnational judicial Dialogue?’ N.C. J. InTL&COM.REG p. 259; Finally, see: Anne Marie Slaughter, (2003) ‘A Global Community of Courts’, 44 Harv. InTL L.J. p. 191. Rather than solve here the contrasting assumptions of these various definitions, I am using here, with revision, the best criteria that I have encountered concerning what constitutes a legal order by Gilian Hadfield and Barry Weingast in their article: “What is Law: A Coordination Account of the Characteristics of a Legal Order.” Harvard Journal of Legal Analysis, March 2011.

<sup>27</sup> Michael Barkun, (1968) ‘Law Without Sanction: Order in Primitive Societies and the World Community’, (Yale Univ. Press.) p. 64. Prof. Barkun has been an invaluable teacher, and colleague.

So, according to Michael Barkun, for law to exist, there must be a pre-existing social and procedural consensus involving a complex calculus of self-interest and tacit collective consent. So, the international legal order is not defined mainly or merely by the presence or absence of legal coercion mechanisms; instead, its main characteristics are normative narratives that are often uniquely developed in specific cultural and historical contexts that contains an indigenous, national or regional *public reasoning process* subject to interrogation and review; these normative narratives and public reasoning process reflect a deeper pre-existing *social and procedural consensus* found among almost all peoples, groups or even states that often insures compliance to an legal order without constant or even recessed coercion. This may help explain why, in view of the strong social forces for compliance, “most law is followed most of the time” -- as Louis Henkin so simply yet eloquent states.<sup>28</sup>

At the same time, there is always a criminal element in domestic or in international affairs. Any subsequent legal violations or criminal behavior of law is often dealt with coercive mechanisms that enhance, *but never insure*, compliance with the law or punishments of such behavior, either on the domestic or international level. In particular, the international legal order is a polycentric system of differing jurisdictions, normative classifications, public reasoning and a decentralized enforcement regime that allocates and often coordinates a lawful penalty for actual criminal and unlawful behavior either by a state, corporation or individual. For instance, the ICC issued arrest warrants of President al-Bashir of Sudan which the United States, though it does not really recognize the court, supported and will enforce, if the *ad hoc* opportunity presents itself. In short, the sanction of criminal behavior can't be the key characteristic of a legal order if such sanctions are too often inconsistent, evaded or avoid, or simply not applied.\*

Hence, as in the case of domestic deviance or crime, the reality of ineffective lawful coercion exists in any meaningful and effective legal order; in fact, the law is never totally effective or insured even in the so called most “advanced” domestic societies. For instance, many murders go unsolved and murders go free in the United States all the

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<sup>28</sup> *Ibid.* See Louis Henkin, (1979) ‘How Nations Behave 47’ (2d ed.) (emphasis omitted). Also see his: (1981) ‘The International Bill of Rights: the Covenant on Civil and Political Rights’, New York: Columbia University Press. Finally, to understand better the complex phenomenon of obedience, which has many causes besides coercion, see: Gene Sharp, (1973) ‘The Politics of Nonviolent Politics, Part I, Power And Struggle’, Porter Sargent Publishers, vol. 1 (June 2).

\* Many thanks to Mr. Edwin Njonguo for sharing this critical idea and insight about the Afrocentric nature of ICC indictments up to now.

time. Hence, the important factor in this regard is the legally sanctioned *possibility or even the increasing probability* of coercive enforcement. Since World War II, this possibility has increased slowly and painfully in the international legal realm, though there is always in most instances the possibility of UN Security Council or now ICC intervention and action.

Yet, as Prof Barkun points out, what is decisive is not the presence of coercion, sometimes avoided, in any jurisdiction; the critical component of an effective legal order, or law, is the *a priori socially shared consensus* to create, operate and support a juridical system that includes norms, duties, responsibilities or sanctions, which are, as Prof Barkun so eloquently states, “*temporally prior to the use of force*” in any legal jurisdiction. In the first instance, this is true of an international legal order as well as a domestic one.

In view of this, there are a variety of possible and plausible rival hypothesis concerning the most accurate paradigm needed to explain the World War II and post war legal innovations and developments. Any such paradigm must be able to explain the *ascendency of the people, or nation as a whole, in relationship to the state* as now being subject to, and protected by, international law.

Furthermore, since World War II, the international legal order has increasingly interpenetrated domestic jurisdictions in a variety of novel yet indispensable ways from trade agreements, administrative law to human rights and *erga omnes* norms. So, there are now a variety of regional, domestic or indigenous jurisdictions and even subsidiary legal orders -- each with its own privileged normative classifications of behavior, public reasoning and enforcement mechanism -- within the overall and composite phenomenon of the post-World War II international legal order. In short, an almost radically new form or “paradigm” (in classical Greek “paradigm” means “form” or “pattern”) of international law emerged out of the agony of World War II, and its aftermath.

Yet, defining such a new paradigm is not an easy task since, in essence, an entirely new and complex international legal order emerged as a result of the War II, and continues to do so today, decades later. So, a preliminary paradigm is ventured here, not as a definitive final definition, but as a needed and overt starting point to progress the debate further concerning a new definition of international law based upon actual historical events, and not held hostage to merely scholarly speculations or outdated definitions. In this regard, it is important to note that international norms now simply

don't come out of the legislative process or state agreements; they also evolve out of humanity's proud yet painful historical journey through unchartered times, with all its wars, tragedies, victories, bravery and often unexpected voices such as President Roosevelt who called, near the very beginning of World War II, for self-determination and greater recognition as well as respect of basic rights, for all peoples — if, (as expressed in the very first words of the UN Charter), “We the Peoples” first won the war.

As such, the new international legal order is a composite and global phenomenon incorporating the world's various jurisdictions in which the promissory and normative narratives of momentous historical events can and are distilled into lasting legal codes or documents that can and do differentially diffuse into a single nation's court room by inclusion of a now obligatory norm or norm into its domestic jurisdiction. This is especially true of the fiduciary norms, relations, duties and obligations that emerged during World War II due to the solemn promises made to their own and others people by the Allied powers that finally were victorious in the war. These promises made, however generalized and inchoate at the time, must become promises kept. In the post-World War II world, this now becomes in particular the critical role as well as responsibility of the judiciary and the courts, who can give concrete legal meaning to the emergent and evolving norms of the Law of Nations that now governs the manifold relationships between a government and its own as well as other peoples.

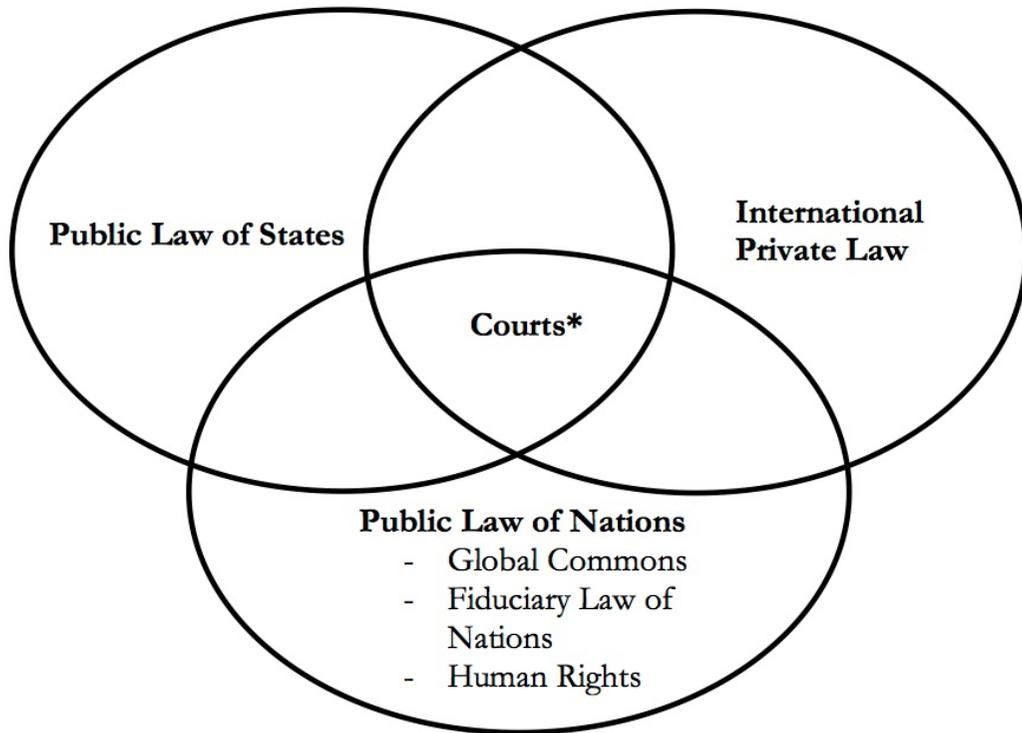
*Thus, Blackstone's understanding of the Law of Nations as one in which domestic or “municipal courts” could and should adjudicate, which occurs in common law systems such as his England at the time, is critical and relevant in this new international legal order, and must be recognized in theory as well as respected in practice. In fact, as the Great Judge Garzon's indictment of Pinochet in Spain illustrates, this is already occurring. At the same time, Bentham's definition of international law should not be simply thrown out; first, his definition of law as that agreed to between sovereigns is a very accurate of the interstate legal order that still very much exists; World War II by no means changed this reality of international life. Since the Treaty of Westphalia in 1648, states have always made agreements or treaties, often short-lived, and will continue to do so in the future. So state-making law is still a critical component of the international legal order; this is simply a fact of current international relations. The new international legal order simply builds upon this state-founded foundation as a means of expanding the normative protections, as well as legal responsibilities, to nations and individuals as well. By doing*

this, the political and legal tensions, always implicate, between the nation and the state are now fully manifest, explicit and—most importantly-- legally regulated.

So, 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, or distinct legal orders, dynamically interact and conflict within and increasingly across domestic jurisdictions* (See Figure 1, *infra*). These three legal orders can be conceptualized, or re-conceptualized as: a) The Public Law of States or, more generally, *Jus inter Gentes*; this is the legal order that embodies and preserves Bentham definition of law; b) The Public Law of Nations or “International Law.” In this sense, it is truly an *inter-national* law, or *Jus Gentium* and is clearly not *jus inter gentes*, or simply law between states; c) Private International Law or Transnational Private Law, also described as the “Conflicts of Laws,” that deals with the laws governing private interests in an increasingly globalized world.

Thus, the narrow term of international law should be enlarged and replaced by the general term of the International Legal Order. Within this, there are three pluralistic, macro and often contested legal orders which can be conceptualized as follows, including the role of the courts where all three Venn diagrams intersect:

## International Legal Order



*\*Independent Judiciaries*

- Domestic, International, indigenous
- General Principles of International Law

**Figure 1:** The Public Law of Nations, which now governs the relationship of governments and states to their own and others peoples, interacting within a pluralistic International Legal Order.

**THE PUBLIC LAW OF STATES:** The first of these international legal orders is conceptualized here as consisting of Public Law of States, or perhaps more accurately “Public Inter-State Law.” These include formal treaties signed and approved by sovereign nation states, as defined and elaborated upon by the Vienna Convention on the Law of Treaties, as well as between nation-states and indigenous peoples within or

between domestic jurisdictions.<sup>29</sup> This order thus recognizes the law making capability, sanctified by Bentham between mostly sovereign European states.

At the same time, it is important to note that these treaties clearly don't, or historically haven't been consistently controlling among these same sovereigns; for instance, several native and sovereign American Indian nations have scores of treaties with the French, Spanish, English and American governments; most of these are observed only in the breach but they are still on the books and hence binding-- if a state's word or bond in treaty law is or will be worth more than the paper it's printed on. Ironically, the rights of indigenous peoples throughout the world as sovereign nations have only relatively been recognized on an international plane by the United Nations.<sup>30</sup> Under Bentham's prevailing paradigm, these indigenous nations obviously have had or have little or no ability to "make law." Under the Law of Nations, this possibility must, once again, seriously entertained especially since most indigenous peoples now live within the jurisdiction of a traditionally defined state and enjoy the hard fought and won rights promised by the Allies during the War.

**THE PUBLIC LAW OF NATIONS can also be** defined here as true "International Law." 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 UN or Nuremberg Charters, the Convention on the Crime and Punishment of Genocide or the subsequent international human rights regime 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

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<sup>29</sup> The Vienna Convention on the Law of Treaties (VCLT) is itself a treaty and specifies what constitutes a treaty. See: United Nations, *Treaty Series*, Vol. 1155, p. 331. It was adopted on 22 May 1969 and opened for signature on 23 May 1969. For a partial record of treaties made with native peoples see: Donald Fixico, (2007) 'Treaties with American Indians: An Encyclopedia of Rights, Conflicts, and Sovereignty', Google eBook, ABC-CLIO.

<sup>30</sup> See: Allen, Stephen, (2009) 'The UN Declaration on the Rights of Indigenous Peoples: Towards a Global Legal Order on Indigenous Rights?' (May 7). Theorizing The Global Legal Order, A. Halpin & V. Roeben, eds., Hart Publishing. Also see: United Nations adopts Declaration on Rights of Indigenous Peoples United Nations News Centre, 13 September 2007. Also see: Aprueba ONU declaración de derechos indígenas *El Universal*, 13 September 2007.

the legal lexicon. In view of this, there is an increasingly important and problematic *legal relationship between a nation or nations and the state* that actually does, or purports to, represent and protect its people under the relevant and respective domestic and international legal orders.

This Public Law of Nations as a legal order **first and foremost, incorporates and consists** of *Jus Gentium* or “Laws...common to humanity” to be adjudicated by domestic, international, regional or indigenous courts and includes common domestic prohibitions against murder, assault, theft and the like. Yet, on a larger scale, these include the legal regimes recognizing and maintaining the Global Commons, the shared and collective norms embodied in international diplomacy as well as of the hybrid treaty and trust norms embodied in the UN Charter including its general recognition of human rights, self-determination, and the outlaw of the use of unilateral force by states except in cases of self-defense against armed attack. The inclusion of the Global Commons, such as the Earth’s oceans and atmosphere, can play an important role in combatting climate change in the future. This possibility is briefly discussed and elaborated upon in the earlier essay “Law of Nations” (2012) published in this Journal.

This Public Law of Nations also includes the critical protections for entire peoples against torture, terrorism—a growing scourge of the “modern” world-- or other forms of attack from their own or other governments, universal jurisdiction, customary international law and domestic human rights law; in view of this, this Public Law of Nations can also be accurately described by using the term “International Law” as well. In fact, this is a more accurate of the original Latin meaning of “national” which comes from the Latin *nationem* (nominative *natio*) "birth, origin; breed, stock, kind, species; race of people, tribe, literally "that which has been born." Or to put it more bluntly, a people, *peoples or nations are naturally born* while states are subsequently social constructions and often somewhat artificially created. So, this is simply transforming Bentham’s use of the word “international” to describe this emergent legal order that actually deals with the rights—fiduciary or otherwise-- of living nations as well as the groups or individuals within it.

This descriptive transformation also restores and recognizes again, in part, the work and ideas of Vattel, Blackstone, and others whose understanding and use of the Law of Nations included a role of the municipal or domestic courts; the courts and country’s’ recognition and practice of the Law of Nations was largely vanquished by

Bentham state-centric definition of “international law” that helped to legally legitimate the prevailing colonial international legal order.<sup>31</sup> During and after World War II, this state-centric legal order, *alone*, actually vanished (but still persists!), and is being slowly but surely replaced by the post war International Legal Order that recognizes the domestic’s court’s role in upholding the Public Law of Nations, or current international law. The faithful and *a priori* observation of these laws provides the only legal basis for the lawful basis of political authority in any state.

An interesting question for future courts or research to consider is whether most or even all of the modern Law of Nations can be described as an enduring trust of all peoples. The fiduciary foundations of this law as a trust is found in the very nature of its contents; yet, as discussed earlier the Public Law of Nations is actually a much earlier concept and was traditionally conceived of in Justinian’s *Institutes* as “common with all of humanity” *as well as* the specific fiduciary norms that emerged out of World War II. After the War, the protection of peoples—entire nations as well as individuals—became a paramount purpose of this international legal order.<sup>32</sup> These are the rights, powers and “property”-- defined in terms of the Lockean meaning of the word (above) to include life and liberty-- of the peoples of the world.<sup>33</sup>

Even so, Justinian was a critical factor in articulating and preserving the Roman idea of *Jus Gentium*. He was also the first to define and champion the concept of the public trust which we have here generally characterized as the global commons in recognition of its international significance and application. So, as part of a Public Law of Nations, a fiduciary Law of Nations that is now “common to all of humanity” is fully consistent with and incorporates the traditional fiduciary legal status of the global commons. In more modern times, this has morphed into the “Common Heritage of Humanity.”<sup>34</sup> This, in fact, clears up another inconsistency of Bentham’s definition of

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<sup>31</sup> See Anthony Anghie, (2004) *Imperialism, Sovereignty and the Making of International Law* (University of Cambridge Press. Also see: Janis, *supra*, ftnotes 151 and 152.

<sup>32</sup> See: Boudreau, (2016) ‘Law of Nations’, *J. Juris* p. 285. Also see: the excellent book by Phillip Jessup, (1948) ‘A Modern Law of Nations’, in which he anticipates the profound paradigm shift occurring, though he dismissed the utility of the Justinian idea of *Jus Gentium* to describe some or all of these developments. He also alleges these developments are *de lege ferenda*, or still in the future of what the law ought to be. (Reprinted: Orth Press (March 15, 2007)).

<sup>33</sup> Locke, *Supra*, note 7: Locke’s definition of property that includes one’s life, liberties and what today we would construe as rights.

<sup>34</sup> Justinian, see: Moyle, J.B., (1913) ‘The Institutes of Justinian’. Translated into English with an Index. Fifth Edition. Oxford: Clarendon Press, viii, pp. 220. Reprinted in 2002 by The Lawbook Exchange, Ltd.

international law since states can't claim (though some do!) a global commons that belongs to all. Most importantly, this now applies to the Earth Atmosphere as a global trust, an issue that may help decide the fate and future of the Earth, if we are to have one. As such, this is where the term "Public Law of Nations"—which includes that which is owned by all-- now truly applies, as it interacts by necessity with the other spheres of the International Legal Order. At the same time, this understanding of the global commons is fully consistent with the fiduciary Law of Nations as outlined in this essay. For this reason, as stated before, the enduring reality of international trusts should be considered a primary source of international law.

The legal inheritance of World War II now belongs to all peoples and individuals everywhere on the globe. By agreeing to and accepting the Charter of the United Nations, which consist (as we have argued elsewhere—see "Law of Nations (2012)) of both trust and treaty law, newly created states are recognizing their obligations as trustees to apply this law to their own peoples as well. This ironically even includes the former Axis nations, all now in new or reconstituted states. It is up to each nation's domestic jurisdiction, first and foremost, to interpret and apply this Law of Nations now available to everyone as a birthright.

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, human rights and an end of colonialism, a goal promised by the Atlantic Charter and other solemn declarations in World War II. In short, the colonial concept of international law, perhaps unwittingly pioneered by Bentham, is now clinically dead as the sole or even dominant explanatory paradigm of the international legal order. In contrast, every domestic or indigenous jurisdiction now has a unique role to play in the development, interpretation and application of the evolving Public Law of Nations, or true International Law.

With the great success of decolonization, the Public Law of Nations anticipates and incorporates a diversity of legal cultures now interacting within the international legal order. Each post-colonial court incorporates those aspects of the Law of Nations most needed or appropriate to its unique jurisdiction; for instance, the article by Dr. Juan Carlos Sainz-Borgo in the same volume as the Law of Nations (2012) eloquently

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LCCN. Also see: Baslar, Kemal, (1998) 'The Concept of the Common Heritage of Mankind in International Law', Dordrecht, The Netherlands: Martinus Nijhoff.

illustrates how the Venezuelan Court rejected the legal norm of “Crimes against Humanity” to characterize the drug trade. For this reason, this legal order is called the Public Laws of Nations” reflects the extraordinary diversity of local, national or regional jurisdictions; in other words, the era of the exclusively sovereign or state-centric international law as a distinctly European creation is over.

In fact, the modern Law of Nations can be argued and justified on a variety of historical, judicial, jurisprudential and even positivist grounds. We have already briefly reviewed the grounds for a historical and juridical Law of Nations in this essay that allows, and even requires, international, regional, domestic and indigenous courts to adjudicate the norms, duties and obligations of the Law of Nations that resulted from the greatest war in human history. From a jurisprudential perspective, we have examine the political philosophy of John Locke and argued, that governments can and do make solemn pledges or promises that become the enduring and now recognized legal legacy of the people; this is especially true, as we have seen, when governments make such solemn promises *and commitments to their own and other peoples simultaneously*; such promissory declaration made in terms so mortal peril must be keep in good faith if the peoples so promised acted upon them to the point of sacrificing their own lives so that their nations and governments can live. Promises to keep under such solemn circumstances are promises that created fiduciary legal norms obligations, and duties that must be enforced by the courts and thus become “promises kept.” This is because the promises made and expressed in the Charter -- with its fiduciary foundations in the wartime promises the Allies - have yet to be fully enacted upon or fulfilled and thus take on the character of an Executory Trust.<sup>v</sup>

In short, the international, national, domestic or indigenous courts of the world must determine the full scope and extent of the Law of Nations in the future. Specifically, current and future courts can find in the constitute documents, declarations and events that helped create a modern Law of Nations the key ingredients—depending on the unique legal evolution and history of each jurisdiction—the legally binding elements of an binding executive, express, implied, constructive, public or other trusts. These courts can also recognize and ensure the fiduciary duties, obligations and rights enjoyed by their own and others peoples. In view of the subsequent sacrifices, costs and consequences among the Allied peoples of the world, these solemn promises made in

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<sup>v</sup> This section inspired and influenced by Ms Brittany Foutz, a talented graduate student in international law.

good faith by the Allied governments can only be construed as creating a binding fiduciary order consisting now of the Public Law of Nations.

So, the Public Law of Nations, or true international law, is—in fact-- a robust and fully operational international legal order that is constantly interacting with, complimentary with, and often contesting, the Public Law of States as well as the third major legal order, which we will now briefly examine.

The third legal order is also known as “Private International Law,” or “Conflicts of Law.” This is the law that attempts to govern or regulate the conduct of businesses and other private interests across boundaries, often resulting in the “Conflict of Laws” at best and jurisdiction shopping for the best law at worst. This law plays an enormous role, for better or worse in the increasing neoliberal globalization of the earth economies. In view of the emergent development of globalized economies, the concomitant and profoundly interrelated issues of worker’s rights should be globalized and legally recognized as well; in particular, such rights should include President Roosevelt’s Four Freedoms, especially the Freedom from Want, and included: an end to child labor, safe working conditions, a decent minimum wage, health insurance and paid holidays, and limited weekly work hours. As one of the key architects of the Post War world, --he raised the issue of free trade for all with Churchill in their first meeting that resulted in its inclusion in the Atlantic Charter-- President Roosevelt’s vision of a free and fair deal for all is or should be a cornerstone of economic globalization. **If not adequately addressed soon, these issues will be increasingly recognized as basic and universal human rights in an evolving human rights regime and thus come under the jurisdiction of the Law of Nations as well; as such,** bitter social, political and judicial contests are surely coming in this regard in the future—if we have one.

Besides not protecting worker’s rights, the greatest weaknesses of Private International Law weakness is its inability to legally recognize or meaningfully protect the Earth’s environment especially local ecologies, or to provide distributional justice, the latter being a concern for Western philosophers since Aristotle’s time...<sup>35</sup>

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<sup>35</sup> Distributional Justice is a concern for Aristotle in his Politics and Ethics but apparently not during our “Enlightened Age.” See, for instance: his Nicomachean Ethics, trans. T.H. Irwin, Introduction. Hackett Publishing Company (Indianapolis: 1999). Also see: (1978) The Aristotelian Ethics: A Study of the Relationship between the Eudemian and Nicomachean Ethics of Aristotle, Oxford.

At the same time, it is vitally important to all of us to unshackle the entrepreneurial spirit and the power of individual people, as well as the nation as a whole, in order to create needed wealth and thus produce the very substances as well as sustenance of our daily lives. So, there is a precious and precarious balance to strike in Private International Law. Yet, since the primary focus of this article has been between Public State law and the Law of Nations, not much more can be said here about this important legal order. Even so, one of the contributions in the same volume of the Journal Jurisprudence as the Law of Nations article (2012) is by Prof. Mihir Kanade and deals with the critical juncture between the Law of Nations and human rights with Private International Legal Order.

*At the center of the international legal order is the world's judiciaries, as well as those general principles of law that are, as the great jurist Prof. Oscar Schachter points out, characteristic of any legal system as such. These include those general principles cited earlier, such as "good faith," concerning the creation of legal obligations out of political discourse and promises.<sup>36</sup> Such general principles also include new fiduciary general principles created out of the Agony of World War II concerning *erga omnes* norms, etc.; these go beyond this essay but are discussed in my forthcoming book.*

These three orders of law dynamically diffuse into and interact with each other, yet each often operates within a distinct legal sphere. Thus, the entire international legal order is pluralistic in nature, and not necessarily monist or dualist.<sup>37</sup> *Most important, within this pluralistic legal order there is a plurality of jurisdictions, and not a single overarching "world law."* In this regard, each court and judge – within his or her own local, national or international jurisdiction-- has a unique role to play in deciding which legal norm applies, and which do not or are irrelevant to the case. 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."<sup>38</sup>

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<sup>36</sup> See the great Prof. Schachter's ideas in this regard at: See, e.g.: Richard Crawford Pugh, Oscar Schachter & Hans Smith, (1993) 'International Law: Cases And Materials', pp. 283-85 (Louis Henkin Ed., West Group 3d Ed.).

<sup>36</sup> Oscar Schachter, (1982) 'International Law In Theory And Practice', 178 Rec.Des Cours 120.

<sup>37</sup> William R. Slomanson, (1990) 'Fundamental Perspectives On International Law', Wadsworth Publ'g Co. 6<sup>th</sup> ed. 2010. which provides an excellent overview and analysis concerning the evolution of human rights law since World War II.

<sup>38</sup> Barkun, (1968) 'Law Without Sanction: Order in Primitive Societies And The World Community', Yale Univ. Press. Prof. Barkun has been an invaluable teacher, and colleague. Here I am defining the nation or

Thus, the cumulative international legal order consists of a variety of interacting domestic, regional, indigenous and international legal orders, each involving unique normative narratives and public reason processes; the international legal order as a whole is thus characterized by any or all regional, domestic or institutional legal orders which interact with those of other peoples or nations. Such interactions may be intermittent and thus short term, or may be continuous, global and expanding. Some of these legal interactions may be limited to two or three states, while others involve entire regions or even span the globe. The courts must ultimately decide the scope and limits of each legal order.

Consistent with this, the primary international legal domains that are truly global in scope are the Public Law of States, The Public International Law, and the Private International Law. The great legal and political contests to come, of course, will be between state law and authority versus the public international law. Such clashes and contests are inevitable since, as we have seen, the peoples and nations of the world have inherited as their birthright and legal inheritance the Law of Nations as a result of the Allied victory in World War II. This fiduciary Law of Nations, in turns, now provides the lawful conditions for the foundation and legitimate existence of the state.

In particular, if a government becomes largely lawless or criminal, and fails to observe the law, or actively violates fiduciary norms or court decisions, then the rights return—as envisioned by John Locke and the American founding fathers, to the nation and to the people. Their first recourse to such perceived or actual injustice should be to the national courts. In turn, States that fail to uphold public international law—so reframed and defined—are still to be regarded as *de facto* states in terms of power and control; yet they can't be termed *de jure* states and their leaders should be held accountable if they continually violate either domestic or international norms and obligations concerning the fiduciary Law of Nations and, by doing so threaten the safety, security, human rights and even the lives of all the people under their jurisdiction. If domestic courts fail to act, then the right and responsibility recurs to courts in other countries or to the ICC, which is the international court of last resort.

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nations legally as a “jural community” usually in relationship to a state, a concept that can be empirically tested, or falsified, though it is an admittedly elusive concept in daily discourse, or in the social sciences.

Specifically, as the Pinochet case illustrates, initiated by the great Spanish magistrate Baltasar Garzon, *independent courts in other lands must address and indict the most egregious breaches of law*. At first, such pioneering judges can expect to be lionized, as well as vilified even in their own country; the eloquent and insightful essay on the trial of Judge Garzon in Spain by Prof. Joaquin Gonzalez Ibanez in the forthcoming volume *Advances in International Law* (Elias-Clark Press) illustrates. Yet, as time goes on and judges indict more war criminals, the price of pioneering the international enforcement of law was lessen and then cease. This is because the great mass of often impoverished and downtrodden humanity instinctively recognizes its judicial champions such as Judge Garzon as its first and final guardians against rampant terrorism, illegal state violence and tyranny.

In summary, because of the post war innovations in international law, a pluralistic international legal order has emerged in the wake of World War II that consists of the traditional state-centric intergovernmental law or the Public Law of States, private international law and a transformed “international law” that includes 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 increase, strengthening the scope and significance of the International Legal Order in the future.

### **The Law of Nations and Global Legal Pluralism**

The concept of “global legal pluralism” accurately though imperfectly captures this phenomenon of a diverse and multifaceted international legal order.<sup>39</sup> It is imperfect for three reasons. First, global legal pluralism is a more complex phenomenon than

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<sup>39</sup> 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 Merry, (2008) ‘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 pp. 149-168. Also see: H.H Koh, (1996) ‘Transnational Legal Processes’, *Nebraska Law Review*, vol. 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, (2000) ‘Judicial Globalization’, 40 *VA J INT'L L.* 1103.

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 initial complexity is recognized by several scholars in the field who, beginning (I believe) with Sally Falk Moore’s pioneering early essays, along with Sally Engle Merry’s wonderful work in the last two decades, brought this phenomenon to the world’s attention.<sup>40</sup> The emergent pluralistic reality is a key reason why comparative legal research must become a critical part of any legal education or scholarship.

Second, the domestic diffusion of legal norms shared among differing national jurisdiction is unquestionably occurring, if not accelerating and thus is a significant phenomenon; but more is going on than this sharing among judiciaries of domestic decisions or norms. In this regard, *it becomes important to discriminate more precisely between the types and processes of legal interactions occurring between legal orders, jurisdictions and international, regional, domestic or indigenous 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. These are, in essence, the laws common to humanity. 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.”<sup>41</sup>

At the same time, every court and jurisdiction is unique. Specifically, different cultures and jurisdictional and even political histories will often critically influence what is incorporated within a nation’s domestic jurisdiction, and what is left out. Thus every jurisdiction is uniquely situated and developed, and contoured by its own historical, legal

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<sup>40</sup> See, e.g.: Sally Falk Moore, (1986) ‘Legal Systems of the World: An Introductory Guide to Classifications’, Leon Pipson & Stanton Wheeler eds. Also see: Sally Engle Merry, (1988) ‘Legal Pluralism’, 22 L & SOC’Y REV, pp. 869, 870. Finally see, e.g.: Berman, as well as Kol at *supra*. note 38.

<sup>41</sup> Berman, *supra* note 38.

and even geographical features. My colleague Juan Carlos Sainz-Borg developed this idea brilliant in his essay in the 2012 Summer volume of this journal.

Yet, third, as stated above, much more is going on than simply domestic diffusion of legal norms; specifically, there is now a new hierarchical and historically determined dimension to international law due to the unique nature of certain fiduciary and often non-derogatory norms that constitute an important part of the modern Law of Nations. Specifically such hierarchical legal norms consist of the wartime and post World War II fiduciary Law of Nations including norms and laws against torture, war crimes, crimes against peace and crimes against humanity. These new and hierarchical norms result in a complex process of judicial incorporation which we will describe here as differential diffusion.

In theory, this is largely a vertical process and occurs when international fiduciary norms, such as the *Jus Cogens* or the relatively “new” *erga omnes* (1970) norms are actually recognized, incorporated and adjudicated in international, regional, domestic or indigenous tribunals.<sup>42</sup> Yet, due to the factors outlined above—the differing types of diffusion and the uniqueness of every legal culture and jurisdiction -- such differential diffusion is not simply a causal consequence of the Public Law of Nations. These processes of diffusion—domestic or transnational as well as differential—occur slowly or rapidly during specific historical periods, especially after wars, and hence such diffusion occurs episodically since some jurisdictions are more receptive at any particular time to incorporating law from other jurisdictions. In short, such differential diffusion occurs case by case and can be profoundly influenced by the unique legal culture of each jurisdiction, society’s relative respect for the Rule of Law, which can fluctuate even within the so called “advanced” legal cultures, as well as the prevailing power politics. For instance, there was an extraordinary growth in the Law of Nations during and

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<sup>42</sup> See Maurizio Ragazzi, (2000) ‘The Concept Of International Obligations Erga Omnes’, Oxford U Press. Also see: M. Cherif Bassiouni, (1998) ‘International Crimes: Jus Cogens and Obligatio Erga Omnes, Law and Contemporary Problems’, Law and Contemporary Problems, vol. 59, pp. 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, (1976) ‘The Concept of Jus Cogens in the Law of Treaties’, North-Holland Publ’g; see also: Carin Kahgan, (1997) ‘Jus Cogens and the Inherent Right of Self Defense’, 3 ILSA J. INT’L & COMP. L. 767. Finally see: Vienna Convention on the Law of Treaties, May 22, 1969, U.N. Doc. A/CONF 39/27.

See, e.g.: *supra* note 9. *Belgium v. Spain - Barcelona Traction, Light and Power Company, Limited (New Application: 1962) - Judgment of 5 February 1970 - Second Phase - Judgments [1970] ICJ 1; ICJ Reports 1970, p 3; [1970] ICJ Rep 3 (5 February 1970)*

immediately after World War II, and only ended with the advent of the Cold War between the United States and the former Soviet Union. In current times, one can unfortunately anticipate a real political resistance to the domestic incorporation of hierarchical and fiduciary norms due to the increasing threats of terrorism, war and the “crisis slide” into group as well as intergroup conflict, civil or international war.

Yet, in such times the rule of law is our greatest, though precarious, safeguard. Legal 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.<sup>43</sup>

This gives added, even urgent, emphasis on the teaching and use of comparative research methods in the legal profession; otherwise, American international legal scholars will largely quote and talk to other American legal scholars, European legal scholars will quote their own peers, and so on down the line in rather insular conversations based upon state or culture -centric scholarship concerning the International Legal Order; in view of this, we need to truly internationalize the profession of international legal studies, and *begin to apply international legal norms and principles to our own and other leaders*; those who are true scholars can and will do this; those who can't will simply criticize from the safety of academic, or continue to comment on micro issues of the law. Yet, the judges and judiciaries of the world are much more active, assertive and certainly not shy; thus the hope of applying the hard fought and won legal norms of the new international Legal Order rests first in their able and experienced hands; as such, judges are the first and final guardians of the international Rule of Law.

In short, there is a now a complex and pluralistic *vertical as well as horizontal* dimension concerning the differential diffusion of fiduciary legal norms into domestic jurisdictions caused by the advent of the World War II charters, norms and subsequent legal 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.<sup>44</sup> In certain cases, these new fiduciary legal norms, like the adjudicated crimes

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<sup>43</sup> Slaughter, 'Judicial Globalization', supra, note 68.

<sup>44</sup> This assertion of a vertical element in international law contradicts the excellent and now famous article by Richard Falk, (1959) 'International Jurisdiction: Horizontal and Vertical Conceptions of legal order', Temple Law Quarterly, vol. 32, pp. 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

of Nuremberg as examples of *erga omnes* norms, can and do preempt domestic legal norms. These can and are being incorporated, without being described as fiduciary norms, into domestic jurisdictions through judicial interpretation, legislative or even executive action.<sup>45</sup> These vertical norms are perhaps our greatest hope now in establishing an enduring International Rule of Law throughout the world.

The vertical nature of differential diffusion 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 -- *legally limited a state's sovereign right to legitimate unilateral political violence* -- constitutes the core of a new Law of Nations and international fiduciary legal order.

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 security. For instance, the four Geneva Conventions (1949) recognize, and even require enforcement actions by "the high contracting parties." As such, the norms of the Geneva Convention, the so-called "Law of Geneva," have become ( I would argue) customary law as well and, as such should become enforceable in any court of law.<sup>46</sup> There is also the common obligation of all signatory states as expressed in the the famous Martens Preamble to the 1907 Hague Convention on the Laws and Customs of War on Land.<sup>47</sup>

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provide remedies to violations of *erga omnes* norms and other fiduciary norms. Judge Garzon's indictment of Pinochet is simply one example.

<sup>45</sup> See: ,for instance, Dr. Christian J. Tams (2010) *Enforcing Obligation Erga Omnes in International Law*. (Cambridge University Press.)

<sup>46</sup> See *supra*. footnote 7. Also See Theodor Meron, (2000) 'The Martens Clause, Principles of Humanity and the Dictates of Public Conscience', 94 AM. J. INT'L L. 78 (Jan.).

<sup>47</sup> *Ibid*.

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).<sup>48</sup> 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 Article 27(2) of the American Convention.<sup>49</sup> Domestic courts within a state’s jurisdiction can now follow the lead of these regional courts.

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 imperfectly 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 established by the Praetor in the exercise of his jurisdiction that exists under the Law of Nations.<sup>50</sup> In short, the existence of the *Jus Gentium* as a whole was often a precondition for the exercise of this type of jurisdiction by a “judge”—in this case, the Praetor. His authority only existed under the consensually created Law of Nations as a whole; in fact, its *raison d’être* was due to the multiple and often competing norms as well as jurisdictions within the Roman Empire. So, if the Romans or “foreigners” wanted to trade and do business in Rome, they had to recognize the *a priori* authority of a third party judge to exercise jurisdiction, as well as even discretion, to settle disputes peacefully. The point is that the authority of *obligatio praetoriae* came directly from the existence of the *Jus Gentium*, or Law of Nations as a whole, and not from any specific decree.

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

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<sup>48</sup> See, e.g.: ICJ’s Barcelona Traction Case. ICJ Rep. 1970,

<sup>49</sup> Advisory opinion OC-8/87 of 30 Jan. 87. Also see: Laurence Burgoque-Larsen, (2011) ‘The Inter-American Court Of Human Rights: Case Law And Commentary’, Oxford u. Press.

<sup>50</sup> See, e.g.: *supra*, note 74.

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 or specific parties' consent. In particular, a distinction should be 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 the exercise of legitimate state authority*.<sup>51</sup> The argument here is essentially that states are only "legitimate" to the extent that they follow the law of Nations, including the Charter of the United Nations as a Executory, Constructive, Public or Implied trust resulting, in the first instance, from the Allies' World War II promises to their own and other peoples if they first fought and won the war.

If such obligations or norms are violated, including the international prohibitions against initiating war, war crimes, terrorism or torture -- then it is preeminently the role of the courts throughout the world to enforce their governments' collective or shared commitment to the law by holding potentially culpable leaders or actors accountable. As mentioned earlier, the full weight of domestic or international adjudication should now equally apply to those, including state or sub state actors or individuals that commit terrorist acts that involve the killing of innocents either by the disproportionate or excessive use of force, or the wanton disregard for innocent civilian life. Terrorism --the attacking of innocent civilians -- seems to be coming a way of life for renege individuals, groups and states as a whole.

In this regard, the cruel calculus of proportionality in any armed conflict counts; if a state or sub state actor claims the right to kill ten, a hundred or a thousand civilians in return for the death of one or several of its own, like the Nazis did, then a war crime has almost unquestionably occurred and needs to be investigated with the purpose of possible prosecution to the fullest extent of the law. Otherwise, the retaliatory state or sub-state actors become savage victims of their own protest, and are committing what they profess to be fighting.

So, terrorism is here defined inclusively, without mitigating exceptions, as actual attacks (regardless of "intent" or "justification") *against innocents, especially those protected by*

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<sup>51</sup> See, e.g.: *supra* note 9. In Early Roman Republic, only one praetor was established. As commercial trade with foreigners increased, a second praetor was established to handle suits in which one or both parties were foreigners (Jus Gentium). The original office was renamed *praetor urbanus*, and the new office was called *praetor peregrinus*.

*law from armed hostilities*, including women, children, babies, the aged, patients or civilians in or near hospitals, or places of worship, UN or Red Cross/Crescent facilities. In view of this, terrorism can be defined as both state sponsored, condoned or conducted acts or attacks of terrorism by governments—in short, state terrorism-- as well as sub-state actors and groups, or demented individuals. In essence, civilians are now the frontlines of any armed dispute, as conflicts in the Middle East, Africa or Afghanistan attest, and this is simply unacceptable.

In view of the growing atrocities of the modern world, an emerging Age of Extremes, the international, regional, national and indigenous courts must seek reliable evidence and when warranted, indict those individuals responsible for such violent atrocities. *The terrible era of state or individual impunity for killing innocent civilians and other war crimes must end*, or the world could slip into a new and deeper dark age from which only more blood, bones and ruins will emerge. As Gideon Gottlieb once stated, the “decline of our civilization may well be measured by reference to the growing gap between professed human ideas solemnly affirmed in international instruments and the growing brutalization of civilians in armed conflict.”

So, 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 stated during the first Nuremberg Trials, must be held accountable in war. In the final analysis, the judges and courts of the world—international, national or domestic as well as indigenous—can and must act to end the current Age of Impunity and restore the very fragile foundations, at least, of a livable world without fear under the Rule of Law.

Yet, great military powers continue to trample upon weaker powers, and millions of innocent civilians are subsequently caught up in the maelstrom. 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.<sup>52</sup> UN weapons inspectors were already in the country,

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<sup>52</sup> See, e.g. Joseph Wilson, (2004) ‘The Politics of Truth: Inside the Lies that Led to War’, Carroll & Graf. Amb. Wilson also published the famous op-ed piece: (2003) “What I Didn’t Find in Africa” New York Times. (July 6). Also see: Michael Isikoff And David Corn. Hubris, (2006) ‘The Inside Story Of Spin,

had extraordinary access and found NO EVIDENCE OF Weapons of Mass Destruction (WMDs); the Iraqi regime was already, in effect, a prisoner of the rigorous international inspection regime. In fact, when the issue was brought before the United Nations Security Council (UNSC) in the fading winter of 2003, the UNSC rejected the United States claim for any justification to attack; yet the U.S. government went ahead anyway, soon after attacking Iraq, despite having no real *casus belli*, as well as facing large scale domestic and unprecedented global protests.<sup>53</sup>

In short, this war was a violent and unprovoked attack against a state and, as such, constitutes a “Crime against Peace,” a criminal category first defined in the Nuremberg Charter. Furthermore, during the war, ample photographic evidence in the public domain was produced to demonstrate that the United States used torture, such as the infamous Abu Ghraib prison photos; in view of this, all of those responsible, especially the civilian leadership in Washington D.C. should be held accountable in a national or international court of law for subsequent War Crimes. 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 or subordinate policy makers all too often went free, or received symbolic sentences. We should not make the same mistake again in the future.<sup>54</sup> Political leaders, their key aides and their civilian lawyers who launched this war should be prosecuted to the fullest extent permitted by international law.

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Scandal, And The Selling Of The Iraq War’, Crown. For a study done by a premier former U.S. intelligence official see: Paul Pillar, (2011) ‘Intelligence And U.S. Foreign Policy: Iraq, 9/11 And Misguided Reform’, Columbia University Press. Finally see: Greg Thielmann, (2013) ‘The Cost of Ignoring UN Inspectors: An Unnecessary War with Iraq’, Arms Association Now, a blog by the Arms Control Association. March 5.

<sup>53</sup> 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. I hope that this will also be a chapter in my forthcoming book, if ever completed, the Law of Nations. Quoting Chief Justice Jackson at Nuremberg: I must [try], as Kipling put it, “splash at a 10-league canvas with brushes of comet’s hair.”

<sup>54</sup> 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’,—

Such prosecutions, when legally warranted, would give needed added life to the “twin offspring” of the war enunciated earlier by General Telford Taylor; as he states above, if the United Nations system of 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*.<sup>55</sup> Applying international legal sanctions simply to the leaders of developing, Third World or African countries is simply not enough or acceptable any longer. In an ethnocentric world, selective suffering or blame is often morally troubling and suspect; ALL human beings bleed a deep red when wounded or killed in unprovoked or unjustified attacks, and thus their attackers must be held accountable, regardless of race, even if they are viewed as somehow privileged or powerful.

In particular, highly developed states are still very much on the warpath, and their leaders must be held accountable as well for unwarranted and murderous attacks. This is needed for leaders of states as well as of terrorists groups when they violate the laws of war as well as peace and kill innocent civilians. This is especially true when there

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Nuremberg Charter, chapter 1, *supra*, at note 4. Witnesses are readily available; see, e.g.: Interview with Col. Lawrence Wilkenson, (2011) ‘Democracy Now’ with Amy Goodman, (Aug. 30) 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 military confrontation or even “preventive” war in Syria or even with Russia and Iran, indicating that there is no learning curve, let alone moral restraint, 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, see e.g.: Ray McGovern AND Doug Rawlings, (2006) ‘Addressing U.S. Intelligence on Iraq and Iran’, Audio Book. Radio Free Maine, Nov. 10,

<sup>55</sup> See: ‘Law of Nations’ (2012) J. Juris. 285.

is obviously no “armed attacks” (Article 51) against their own nation or state, and yet they still go to war against an uninvolved state or a powerless people. As we have seen, this seems to be the case in the unprovoked attack on Iraq, and those that fomented and initiated this war should be brought into a Court of Law somewhere at some point in the near future to examine the legal evidence for and against their unprovoked attack.

In other words, that the very fabric of a state’s legal legitimacy is determined by its observance of the Law of Nations, especially the new fiduciary as well as erga omnes norms, not only in relationship to other states, but now to its own people, first and foremost as well. Thus it is ultimately the responsibility of a nation’s own 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 fiduciary norms to justice. As Prof. Joaquin Gonzales Ibanez of Spain argues so eloquently, the apparent Age of Impunity for leaders suspected of, or actually indicted for, war crimes and other graves offences against humanity must end, and thus fulfill the promise of the UN and Nuremberg Charters.

The so-called Chilcot Report dealing with prime Minister’s Tony Blair’s decision to commit troops of the United Kingdom is a good beginning and illustrative of the type of critical introspection that a country must conduct after an so called “optional” or “preventive” war.<sup>56</sup> Yet, Blair was merely following the lead of his ally the United States. So, in sharp contrast to the U.K., the lack of any similar official, let alone legal, inquiry or indictments in the United States, especially by our international legal profession, concerning the Bush administration decision to launch a war that resulted in the deaths or life-long wounding of thousands of American soldiers, hundreds of thousands of Iraqis and the now largely destroyed or decimated state, as well as society, with the resulting emergence of ISIL is simply astounding. Such legal introspection and adjudication of the war, in a Court of Law where all the evidence, for and against, can be assembled and publically argued in a necessary though painful cross-examination, is essential in a society such as the United States that claims to be governed by the Rule of law.

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<sup>56</sup> The Report of the Iraq Inquiry was published on 6 July 2016. Sir John Chilcot's public statement can be read at: <http://www.iraqinquiry.org.uk/>

**CONCLUSION:** “Making Gentle the Ways of the World”

-The Hope of Aeschylus

The purpose of this chapter is to present, in brief outline, the jurisprudential argument for the Law of Nations within a pluralistic International Legal Order. This argument has, by necessity, requires a somewhat archeological and inevitably inadequate excavation into the theories and thinking of Bentham and his professorial predecessor, Blackstone. The resulting paradigm proffered here of the International Legal Order must be ultimately measured by the number of episodic exceptions and blind spots that it answers or fills in Bentham’s outdated understanding of international law as basically agreements between states, or of recognized state practice. As such, jurisprudence is not concerned with the “is” and the “ought;” it is ultimately concerned with articulating the most accurate and plausible “rival hypothesis” to new facts, historic developments and subsequent legal innovations. So, if this paradigm offered here of a Public Law of Nations within a robust International Legal Order as a beginning of this quest; if it fails in whole or in part in this regard, the challenge then is to define and develop a better one the more fully explains the post-World War II legal innovations and other evidence, including the glaring “exceptions” created and now fully recognized (See paragraph I of this Chapter) to Bentham’s state-centric international law.

Undoubtedly, there will be those who will continue to believe, like Voltaire’s Prof. Pangloss, that Bentham’s conception of international law is the “best of all possible worlds.” In contrast, this essay has tried to demonstrate the inadequacy of this antiquated paradigm in view of the exciting and evolving legal developments in terms of a new paradigm of international law.

To put it bluntly, Bentham’s conveniently colonial conception of international law should have perished with the post war period of de-colonization and the subsequently slow but inexorable liberation of formerly colonized peoples, promised by the Atlantic Charter and Roosevelt’s four freedoms, within all of the European (—and American—) former colonies.

Yet, as mentioned earlier, 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. The abject failure for any such judicial review or scholarly condemnation within the United States concerning the Bush Administration unilateral decision to attack Iraq in the spring of 2003 is cited as a glaring example of the current Age of Impunity that can and must end if there is any hope of a world governed by the Rule of Law.

*As such, in contrast to the old paradigm of international law, this new paradigm of the International Legal Order provides, if not requires, a vital new role for domestic, regional, indigenous or international courts in upholding the new fiduciary Law of Nations as the basic legal precondition of legitimate state authority; only a truly independent and fully respected judiciary can do this. So, ultimately, it's up to the current courts or the ones in session in the future –that will have to in decide if the promissory declarations and documents produced by the Allied powers in and immediately after World War II can or should be construed as a trust under accepted rules of construction or practice. Given the evidence cited above, as well as the declarations, speeches and documents left unexamined during this period, such a legal decision is, I believe, inevitable. In this sense, such an independent judiciary is the high mark of self-determination and thus the true measure of a state's sovereignty. The independence of the judiciary, in turn, can be measured by this simple maxim: "When the courts decide, the nation--and government--abide."*

Unfortunately history is too vivid and rich with recurring examples of states becoming ravenous beasts or lawless Leviathans, always seeking more power and control. Under the new International Legal Order, the lawful power of the state can be checked, limited and preserved, in the first instance, by its strict observance of inter-state and international law as embodied in the Charter of the United Nations. If, however, future atrocities, acts of terrorism, armed conflicts or even inter-state wars come, the appropriate remedy becomes, when necessary, the domestic, indigenous, regional or international jurisdictions and judges of the world prosecuting the individuals, groups, regimes or administrations who initiated such irreversible horrors.. As such, the differing jural communities throughout the world and their courts --if the latter are truly independent --will always provide the most significant safeguard for peace, human rights, human liberty, and a strengthened International Legal Order.