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CALL FOR PAPERS

The field of jurisprudence lies at the nexus of law and politics, the practical and the philosophical. By understanding the theoretical foundations of law, jurisprudence can inform us of the place of legal structures within larger philosophical frameworks. In its inaugural edition, *The Journal Jurisprudence* received many creative and telling answers to the question, “What is Law?” For the second edition, the editors challenged the scholarly and lay communities to inquire into intersection between jurisprudence and economics.

With the backing of our diverse and disparate community, *The Journal Jurisprudence* has now evolved into a more diverse form. We will no longer be setting a question for each issue, but instead designing issues around the articles we received. Therefore, we invite scholars, lawyers, judges, philosophers and lay people tackle the any and all of the great questions of law. Knowing that ideas come in all forms, papers can be of any length, although emphasis is placed on readability by lay audiences.

Papers may engage with case studies, philosophical arguments or any other method that answers philosophical question applicable to the law. Importantly, articles will be selected based upon quality and the readability of works by non-specialists. The intent of the Journal is to involve non-scholars in the important debates of legal philosophy.

The Journal also welcomes and encourages submissions of articles typically not found in law journals, including opinionated or personalised insights into the philosophy of law and its applications to practical situations.

Jurisprudence is published four times per year, to coincide with the four terms of the legal year, in an attractive paperback and electronic edition.

All authors who submit to this edition will be provided with a complementary copy of the journal.

Length: Any length is acceptable, although readability to non-specialist is key.

Presentation Style: Papers must comply with the Australian Guide to Legal Citations, Second Edition published by the Melbourne University Law Review. An electronic edition is available at, http://mulr.law.unimelb.edu.au/PDFs/aglc_dl.pdf

Submission: You must submit electronically in Microsoft Word format to editor@jurisprudence.com.au. Extraneous formatting is discouraged.

Correspondence can also be sent to this address. If you are considering submitting an article, you are invited to contact the editor to discuss ideas before authoring a work.

SUBSCRIPTION INFORMATION

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- 2) A subscription to the Journal can be purchased for AU\$150 per year, or AU\$280 for two years. This price includes postage throughout the world. Payment can be made by international bank cheque, but not a personal cheque, to:

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Alternatively, the Journal is available online at www.jurisprudence.com.au and can be read there free of charge.

FORWARD

The Right Honourable Malcolm Fraser, AC CH
Prime Minister of Australia (1975 – 1983)

The Journal Jurisprudence has a high reputation as an effective and authoritative law journal. I am delighted to see the effort being made to bridge the gap between academic study of legal philosophy and the actual practice of the law. This edition focuses on the challenges and opportunities in international law after the Second World War, out of which we can draw valuable lessons for the problems of international governance in our own time.

These essays are important because they cover philosophy and the practical application. There are many people who say they believe in the Rule of Law and in due process but many who do so are not prepared to carry that commitment forward with vigour and effect.

The establishment of the International Criminal Court was a momentous change, in some ways, as important as the foundation of the United Nations itself. In theory, it meant that those nations who acceded to the Treaty were prepared to accept the obligations under the ICC. Obligations to fulfil the law and to abide by it. In his article Dr Juan Carlos Sainz-Borgo skilfully documents this challenge with international drug trafficking and draws our attention to the structural issues in international law faced by the ICC. Unfortunately, in many situations, the law is honoured in the breach. The Iraq War itself was illegal, just as many conflicts in the past have been. Professor Thomas Boudreau's analysis of the aftermath of World War II and the genesis of the Law of Nations reminds us of values which should have been heeded by world leaders before the Iraq War. Then as now, the great and the powerful accept the law when it coincides with their perception of their national interests, but when it does not, they do what they want to do anyway.

The law is not always applied impartially. Very often friends or allies are allowed to do things which will incur strong opposition if undertaken by another country. Professor Mihiri Kanade's article elucidates this trend in the tensions between human rights and international trade. Likewise, Iran's pursuit of nuclear missiles is a case in point. Under the terms of the Non-

proliferation Treaty, she is allowed to pursue enrichment, but not allowed to create a bomb. The West does not want Iran to pursue enrichment because they fear that Iran wants to produce a bomb and thus diplomatic efforts by the West have been vigorous and sometimes harsh in seeking to coerce Iran to give up plans for enrichment.

In stark contrast, Israel has a nuclear arsenal about the same size as China's, but she is not subject to international supervision, not subject to any treaties or controls, because she is a friend of the United States, she is allowed to do as she wishes. The proliferation of nuclear weapons in all states is the antithesis of a secure and prosperous world. There have been positive lessons in multilateral interventions and the responsibility to protect, particularly in Libya as documented in Professor Bernard Ntahiraja's article. Extending this passion for resolving regional conflicts to ending global nuclear proliferation will be a particular challenge for today's young people as they assume global leadership.

The West needs to learn that if there is to be a peaceful and lawful world, the Rule of Law must apply to all people and to all nations. Assistant Professor Tara Helfman insightfully documents this virtue, particularly as it was embodied by the Nuremberg prosecutor Francis Biddle. Living up to Biddle's example and strengthening the rule of law is a great challenge ahead of us.

In addition, we need a much better understanding that if the Rule of Law is to be applied equally within a country, governments must follow due process in relation to their own actions and also in relation to the law. Without due process, governments will make foolish decisions. They will try to sidestep the law. Without due process there is no justice.

It is a sobering thought that in recent times, freedoms hard won through centuries of struggle, in the United Kingdom and elsewhere have been whittled away. In Australia alone we have laws that allow the secret detention of the innocent. We have had a vast expansion of the power of intelligence agencies. In many cases the onus of proof has been reversed and the justice that once prevailed as been gravely diminished. This is underlined by a decision of the High Court which has effectively said the Federal Parliament has the power to overturn any Common Law right which our fathers most certainly took for granted and which our ancestors struggled to establish through the ages. It is a sobering thought that this is the position we have reached in the year 2012, even after the struggles of

the past six decades. As Professor Helfman shows, even with the desire of retribution at Nuremberg, the values of fairness, justice and the rule of law still prevailed.

I congratulate the Journal Jurisprudence in its efforts to improve and uphold the law throughout the world. This current issue of the Journal is an important contribution in this ongoing struggle, as the first author Thomas Boudreau states, between “the lawless leviathan and the rule of law.”

About the Contributors*

Thomas Boudreau Ph.D. (U.S.A.)

Prof. Boudreau is a Professor in the Conflict Analysis Department at Salisbury University. As a graduate student, he attended the Maxwell School of Citizenship and Public Affairs at Syracuse University where he earned his Ph.D. in Social Science in 1985. While in graduate school, Boudreau was appointed as Project Director for the "Crisis Management Research Project" at the Carnegie Council for Ethics and International Affairs in New York City. While there, he served as a private consultant to the Executive Office of the United Nations Secretary-General (1982-1987) which resulted in his first book *Sheathing the Sword*, which is the definitive legal interpretation of Article 99 of the U.N. Charter.

Since leaving graduate School, Boudreau has taught international law at American and Syracuse University, as well as the University of Pennsylvania. He served as a *pro bono* legal advisor to the Permanent Bosnian Mission to the United Nations during the Bosnian War (1992-1995). As a result of this experience, he became interested in the legal and diplomatic history of World War II and, in particular, competing legal theories concerning international enforcement of human rights law, self-determination and collective security. The article in this issue of the Journal is a result of his reflections; he is also working on a book entitled *Law of Nations: Legal Order in a Violent World*. He has also written a variety of articles and book chapters on violent conflicts, crisis management, and international law, including two recent essays, co-authored with Prof. Brian Polkinghorn, on "Collective Security" and "Peace Initiatives" in the *Oxford International Encyclopedia of Peace* (2010). He is also Senior Research Fellow at the Institute for Resource and Security Studies (IRSS) in Cambridge Massachusetts.

Aron Ping D'Souza (Australia)

Doctor Aron Ping D'Souza is the editor of *The Journal Jurisprudence*. He was educated at the University of Oxford, where he was awarded a law degree, with honours, and was a member of Harris Manchester College. In 2012, he endowed a prize for the best performance in the Second BA in Jurisprudence. Aron wrote his Ph.D. on the jurisprudence of intellectual property law at the University of Melbourne, where he taught in the economics and political science programs between 2007 and 2010. He also

* In alphabetical order.

holds two undergraduate degrees from Monash University, where he was a tutor from 2005 until 2007. Additionally, he is the author of three books: *The Art of Time* (2007), *Special Protections: The Ethics of Copyright and Aboriginal Iconography* (2009) and *A General Theory of Property* (2011). His writings have appeared in the editorial pages of numerous newspapers, including *The Times of London*, *the Herald Sun*, *the Australian Financial Review* and *the Gulf Times*.

The Rt. Hon. Malcolm Fraser, AC CH (Australia)

Born in Melbourne in 1930, Malcolm Fraser grew up on farming properties in New South Wales and Victoria. In 1948 he was accepted into Oxford, graduating with a Masters of Arts degree. On his return to Australia, Fraser entered politics and at the age of 25 was elected the Liberal member for Wannon in Victoria. In 1966, he was made Minister for the Army in the Holt Government, and after Holt's death in 1967, he became Minister for Education and Science. Following the dramatic dismissal of the Whitlam Government in November 1975, Malcolm Fraser became Prime Minister of the Commonwealth of Australia and served until 1983. More recently, Fraser was co-chairman of the Commonwealth Group of Eminent Persons, which worked toward democracy in South Africa. He formed the humanitarian aid organization CARE Australia in 1987, which he chaired until 2002, and served as president and vice-president of CARE International.

Judge Baltasar Garzon (Spain)

Baltasar Garzón Real is a Spanish jurist with a Lawyer Degree from Universidad de Sevilla in 1979. He formerly served on Spain's central criminal court, the Audiencia Nacional, and was the examining magistrate of the *Juzgado Central de Instrucción No. 5*, which investigates the most important criminal cases in Spain, including terrorism, organized crime, and money laundering. In 1993–94 he was elected a Member of the Parliament and briefly held a ministerial role in the Felipe González's socialist government.

Following his return to the *Audiencia Nacional*, Judge Garzon led a series of investigations that helped convict a government minister as the head of the Grupos Antiterroristas de Liberación (GAL), a state terrorist group. In a historic action, Judge Garzón issued in 1998 an international warrant for the arrest of former Chilean President, General Augusto Pinochet, for the alleged deaths and torture of Spanish citizens. Until recently, he worked as an advisor to the Prosecutor of the International Criminal Court in the Hague. Today he works as an Advisor of the Organization of American

States Mission in Colombia, and is a member of the United Nation Committee against Torture. He also teaches Penal Law at the Universidad Complutense in Madrid and currently heads Julian Assange's legal team.

Tara J. Helfman (U.S.A.)

Prof. Helfman is Assistant Professor, Syracuse University College of Law; Her education consists of degrees from: Yale Law School, J.D.; University of Cambridge, M.Phil., Political Thought & Intellectual History; University College London, M.A., Legal & Political Theory; Queens College, CUNY, B.A., History. Currently, Prof. Helfman teaches contract law, international law, constitutional law, and law of the sea at the Syracuse University College of Law. She spent 2009-10 as the Olin/Searle Fellow at the New York University School of Law conducting research on counterproliferation, maritime law, and legal history. Her current research interests include the laws of war, maritime piracy, and Anglo-American constitutional history.

A British Marshall Scholar and a graduate of Yale Law School, Professor Helfman spent three years as an associate at Debevoise and Plimpton LLP, where she was a member of the International Dispute Resolution and Securities and White Collar Defense practice groups. Her pro bono work included death penalty cases, habeas petitions, and disability rights advocacy. While at Yale, Professor Helfman was awarded the Joseph Parker Prize for Legal History and the Yale Journal of International Law Young Scholar Award.

Mihir Kanade (India)

Prof. Kanade is the Director of the UPEACE Human Rights Centre and is also a faculty member in the Department of International Law and Human Rights at UPEACE. Prior to academia, Mihir practiced for several years as a lawyer in the Supreme Court of India and the Bombay High Court, focusing on intersections between economic law and human rights law. He has served as a legal advisor to many human rights organizations in India and has represented them before different courts and tribunals in criminal, constitutional and labour cases. His principal area of academic research and study is Human Rights and Globalization.

Bernard Ntahiraja (Burundi)

Prof. Ntahiraja is now serving as a Lecturer at the University of Burundi. He is also involved in capacity building activities for law professionals. Before starting his academic career, Bernard worked in the Law firm Rubeya & Co

Advocates in Burundi. His current areas of interest are regional integration (with a focus on security, human rights, and disputes settlement as associated to that phenomenon) and criminal justice (with a special focus on juvenile justice). He holds a MA in International Law and the Settlement of Disputes from the University for Peace, an MA in Human Rights and Peaceful Resolution of Conflicts from the University of Burundi and a bachelor degree in Law, from by the University of Burundi as well.

Brian Polkinghorn (USA)

Brian Polkinghorn is a Distinguished Professor and Program Director in the Department of Conflict Analysis and Dispute Resolution and Executive Director of the Center for Conflict Resolution, Salisbury University. Brian is an alumnus of the Program on the Analysis and Resolution of Conflicts (PARC) located in the Maxwell School, Syracuse University, the Institute (now School) of Conflict Analysis and Resolution at George Mason University and a Fellow of the Program on Negotiation at Harvard Law School. He was a Senior Fulbright Scholar to Tel Aviv University in Israel.

Brian has worked in several countries and across the United States developing several dozen graduate conflict resolution programs. He also intervenes in a variety of types of cases worldwide ranging from peace talks, judicial reform, and humanitarian assistance to a range of environmental and resource management disputes. Brian also works with a talented team of researchers in the center conducting several national level research projects in-state and federal agency ADR (Appropriate Dispute Resolution) programs as well as comprehensive statewide reviews of court ADR programs

Juan Carlos Sainz-Borgo (Venezuela)

Juan Carlos Sainz Borgo is a scholar and attorney specializing in international law and international humanitarian law. Currently he is Professor of International Law at the Universidad Central de Venezuela, Caracas and Associate Professor and Head of Department of International Law. United Nations mandate University for Peace (UPEACE), Costa Rica. He has been consultant on international law to the Andean Community, Andean Corporation of Development, Organization of American States, corporations, numerous non-governmental organizations, as well as to the Venezuelan Government in border and environmental issues. He lectures in Venezuela, Colombia, Costa Rica, Spain and the United States. He has published four books and more than thirty articles in English and Spanish. He holds a Doctorate in Law (Honors) and LL.M. in International Law

from Universidad Central de Venezuela and a Masters in Public Policy from
St Cross College, University of Oxford.

EDITORIAL

Dr Aron Ping D'Souza*
Editor

This issue is the brainchild of a distinguished scholar of international law and its realisation is a testament to his diligence and creativity. Professor Thomas E. Boudreau is a professor at Salisbury University and a former faculty member of the Maxwell School at Syracuse University. Before entering academia, he was an advisor to the Executive Office of the Secretary-General at the United Nations and has dedicated his life to the study of international law. It is fitting that he is our guest editor for this important edition.

Professor Boudreau built a team of editors including Associate Professor Juan Carlos Sainz-Borgo of the University of Peace and Professor Brian Polkinghorn of Salisbury University to bring this edition to life. The scale and the breadth of contributors to this edition are a testament to the team's high stature in the field. This edition includes contributions by academics, jurists and political figures from all six inhabited continents. It is the first time that *The Journal Jurisprudence* has published an edition with such a diverse range of authors and editors.

Additionally, the prominence of the authors of articles in this edition is a clear indication of the relevance of the topic matter we are addressing. It is a great honour for this edition of our journal, the fifteenth, to commence with a forward by the Right Honourable Malcolm Fraser, former Prime Minister of the Commonwealth of Australia. Mr Fraser has been a tremendous inspiration to me and many other Australians. His deep and passionate commitment to justice, the rule of law and the elimination of racism makes him a heroic voice in political discourses.

Furthermore, we are pleased to publish the very important work "Avances en la Jurisprudencia Internacional en Violencia Sexual contra Mujeres en Conflictos Armados" by Judge Baltasar Garzón, former judge of the National Court of Spain, the *Audiencia Nacional*. We are especially grateful to Judge Garzón for preparing this piece and taking time from his busy schedule: As we go to the press, he is leading the legal team representing

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Wikileaks founder Julian Assange. Judge Garzón has distinguished himself as a man of tremendous energy and intellectual capabilities and his current article is no exception. Many of you would know that he came to great prominence when he led the indictment of the Chilean dictator Augusto Pinochet in 1998. We are grateful to Prof. Dr. Joaquín González Ibáñez of Universidad Alfonso X el Sabio for editing this article.

Professor Tara Helfman contributes an insightful and original article on the Nuremberg prosecutor Francis Biddle to this edition. Professor Helfman has an impressive track record in both legal practice and scholarship, first at Debevoise and Plimpton and now at Syracuse University. She embodies the spirit of *The Journal Jurisprudence* and our mission to bridge the gap between the practice of law and the macro-questions of jurisprudence. She has my great gratitude for her contribution but also for editing articles late into the evening as we went to press.

Dr Juan Carlos Sainz-Borgo makes a distinctive contribution in his article on drug trafficking and the ICC. So do Professor Mihir Kanade and Professor Bernard Ntahiraja reflect on similar trends in the human rights dimension of international trade and the responsibility to protect in their respective articles. These are important contribution to the study of international law and will, I am sure, be read by students and scholars in the future.

Of particular note is Professor Brian Polkinghorn's afterward to this edition. As a real-world practitioner of international law, having helped resolved conflicts in Bosnia and the Middle East, he brings his unique insights and critiques to each article in the edition. I value contributions of this type because they give a more practical context to academic writings. Professor Polkinghorn's contribution really does help us bridge the gap between the philosophy and practice of law.

It has been a tremendous pleasure to oversee the construction of this issue. I know that this issue will be read with pleasure, critiqued with passion, and will create a lasting impact in the field of international law. The credit for this must be given to Professor Boudreau and his team, whose vision and dedication brought this edition to life. I can say without qualification that this is the most important issue of *The Journal Jurisprudence* published to date and sets a very high standard for future editions.

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

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Summary:

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

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

PREFACE:

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

DEDICATED:

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

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

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

⁺ In Alphabetical Order.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE FIRST PROMISES: THE ATLANTIC CHARTER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE ATLANTIC CHARTER:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As General Carlos Romulo of the Philliphines stated:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DECLARATION of [the] United Nations

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

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

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

DECLARE:

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

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

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

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

Done at Washington

January First, 1942⁴¹

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PROMISES MADE: THE CRUCIBLE OF WORLD WAR II

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“Fides Servanda Est; Simplicitas Juris Gentium Praevaleat”

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

3 Burrows 1672

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

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

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

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

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

LOCKE'S ARGUMENT: GOVERNMENT AS A TRUST

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

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

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

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

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

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

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

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

60 See SIMMONS, *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

69 BARKUN, *supra*, note 13.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE NATION AND THE STATE: THE NEW PROBLEMATIQUE?

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

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

⁷⁵ See *supra*, note 70.

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

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

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

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

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

78 Boudreau, *supra* note 76

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

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

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

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

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

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

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

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

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

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

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

83 *Ibid.*, Andreii

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

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

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

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

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

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

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

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

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

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

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

88 *Ibid.*

89 See *supra* notes 2-10.

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

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

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

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

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

91 Ibid, BOUDREAU

92 *Supra* notes 10, 11, 12

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

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

THE NUREMBERG CHARTER: THE NATION VS. THE STATE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

NEVER AGAIN? THE INTERNATIONAL CRIMINAL COURT AND R2P

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

THE TWO EDGED SWORD? HUMANITARIAN INTERVENTION

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

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

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

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

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

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

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

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

101 SHIRER, *Supra* at 85.

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

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

In this regard, it is important to note that the Law of Nations, like the doctrine concerning the freedom of the Seas, is capable of evolution and growth within this traditional fiduciary legal order. This is especially true of the Charter of the United Nations and the legacy principles of human rights, self determination, trusteeship and collective security that it contains. For instance, the accepted practice of UN peacekeeping—mentioned no where in the Charter—is an accepted outgrowth of its primary mission to maintain international peace and security. In short, evolution, as the outcome of experience, is the life of the law.

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

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

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

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

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

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

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

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

106 See *supra*, note 3.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PART IV: A NEW INTERNATIONAL PLURALISTIC ORDER:

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

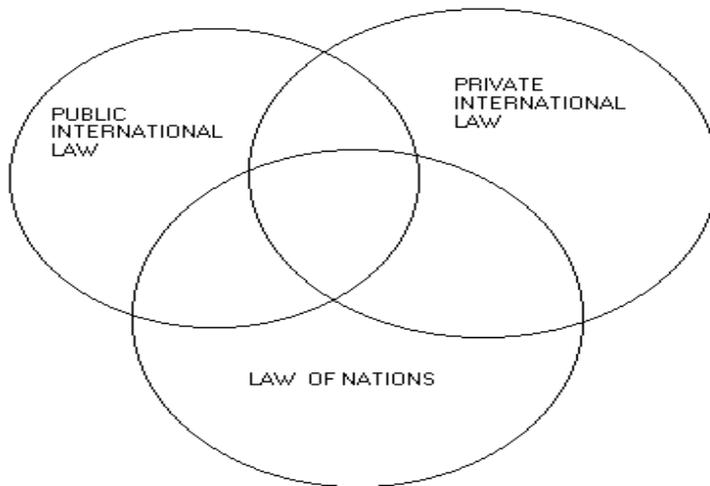


Figure 1: The Fiduciary Law of Nations interacting in a International Pluralistic Legal Order

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

112 SLOMANSON, *supra* note 10

113 BARKUN, *Supra* note 13

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

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

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

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

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

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

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

116 BERMAN, *supra* note 114.

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

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

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

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

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

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

120 See Koh, *supra* note 114

121 See *supra* notes 2-11.

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

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

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

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

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

123 Ibid.

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

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

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

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

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

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

127 See, e.g., supra note 9

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

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

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

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

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

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

CONCLUSION: THE LEVIATHAN AND THE LAW

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

Albert Camus, Nobel Laureate
Neither Victims nor Executioners

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

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

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

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

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

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

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

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

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

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

131 See, *supra*. note 111.

**FRANCIS BIDDLE AND THE NUREMBERG LEGACY: WAKING THE
HUMAN CONSCIENCE**

Tara Helfman¹

I. INTRODUCTION

On 1 October 1945, former United States Attorney General Francis Biddle embarked for Europe on the *Queen Mary*.² The weather was unseasonably hot and the boat was filthy, covered in graffiti left by soldier transports. Only the day before, Biddle was being fêted in Washington, D.C., where he had been sworn in as the American member of the International Military Tribunal for the Trial of German Major War Criminals, the Nuremberg Tribunal.³ Now he was heading to war-ravaged Germany to help oversee what President Harry S. Truman would call ‘the first international criminal assize in history.’⁴ Biddle was accompanied by his advisors, Assistant Attorney General Herbert Wechsler and Quincey Wright of the University of Chicago.⁵ The men were already vigorously discussing

1 Assistant Professor, Syracuse University College of Law; Yale Law School, J.D.; University of Cambridge, M.Phil., Political Thought & Intellectual History; University College London, M.A., Legal & Political Theory; Queens College, CUNY, B.A., History. The author wishes to thank Professor Thomas Boudreau for his guidance and support while she was writing this article. Any faults are entirely the authors own.

2 Francis Biddle Collection of International Military Tribunal Nuremberg Trial Documents and Related Material, Syracuse University, New York (Biddle Collection) Box 1, Journal, 2 October 1945. Two works identify the ship as the *Queen Elizabeth*. See, eg, Joseph E. Persico, *Nuremberg: Infamy on Trial* (1994) 77; Ann and John Tusa, *The Nuremberg Trial* (1984) 116. However, Biddle in his own journal identifies it as the *Queen Mary*.

3 Biddle Collection, above n 2, Box 1, Journal, 2 October 1945.

4 *US Department of State Bulletin*, Vol. 15 (27 October 1946) 755.

5 From 1944 to 1946, Wechsler served as Assistant Attorney General in charge of the War Division. He was a member of the Columbia faculty throughout his career, also serving as Director of the American Law Institute for 21 years. In Memoriam: Herbert Wechsler, 1909-2000, *American Law Institute Reporter* (2000), American Law Institute, http://www.ali.org/ali_old/R2204_Wechsler.htm at 16 August 2012; Tamar Lewin, Herbert Wechsler, Legal Giant, Is Dead at 90, *New York Times*, 28 April 2000. During WWII, Quincey Wright served as an advisor on international law to the Department of State and the Foreign Economic Administration. Dr. Quincy Wright, 79, Is Dead; Authority on International Law, *New York Times*, 18 October 1970, 92. He subsequently served as President of the American Society of International Law from 1955 to 1956. The American Society of International Law Presidents Gallery, <http://www.asil.org/asilpresidents.html>, at 18 August 2012.

the difficult task at hand. Wright was concerned that the legitimacy of the Tribunal would be undermined by claims that the legal principles to be applied were generated *ex post facto*.⁶ ‘It seems to me,’ Biddle wrote, ‘that we can state that we are bound by and cannot examine the instrument under which we are acting, particularly after we have taken an oath so to act – but that we are not thereby excluded from pointing out the large body of international law existing in 1939. Our opinion must at least have its roots in the past even if its fruits are to ripen in the future.’⁷

This article will offer new insights into the legal and historical significance of the Nuremberg Tribunal gleaned from the personal papers of the American member. That Nuremberg serves as the juridical touchstone of modern international criminal law almost goes without saying. Hardly a work on the subject fails to mention the Tribunal’s significance for the development of international criminal law.⁸ Drawing on primary sources, particularly the papers of Francis Biddle and meeting notes of the Tribunal,⁹ this article shows that the Members were acutely aware that the proceedings at Nuremberg represented an important pivot point in the history of international law, and that they managed the proceedings accordingly.¹⁰ Biddle knew that a great deal more was at stake at Nuremberg than the fate of the twenty-two Nazi defendants on trial. The future of international criminal law was also in the Tribunal’s hands.

6 Biddle Collection, above n 2, Box 1, Journal, 2 October 1946.

7 Ibid. Hans Kelsen took the view that [t]he judgment rendered by the International Military Tribunal in the Nuremberg Trial cannot constitute a true precedent because it did not establish a new rule of law, but merely applied pre-existing rules of law laid down by the International Agreement concluded on August 8, 1945, in London.[.] Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law? (1947) *International Law Quarterly* 153, 154.

8 Ruti G. Teitel has noted, The period immediately following World War II was the heyday of international justice. *Transitional Justice Genealogy* (2003) *Harvard Human Rights Journal* 73. See also, Michael J. Kelly and Timothy L.H. McCormack, Contributions of the Nuremberg Trial to the Subsequent Development of International Law in David A. Blumenthal and Timothy L.H. McCormack (eds), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?* (2008) 101, 103 (It is hardly surprising then that Nuremberg, as the first champion of the principle of individual criminal responsibility for violations of international law, retains an exalted status.).

9 The Special Collections Research Center of the Syracuse University Library in New York houses the Francis Biddle Collection of International Military Tribunal Nuremberg Trial Documents and Related Material. The collection consists of nineteen boxes of documents, including personal notes and correspondence, meeting minutes and notes, draft opinions, photographic evidence, and scrapbooks.

10 M. Cherif Bassiouni, The ‘Nuremberg Legacy’ in Guénaél Mettraux (ed), *Perspectives on the Nuremberg Trial* (2008) 577, 583.

It was in this vein that, while sailing to Europe, Biddle asked Wright, ‘to let [Biddle] have, briefly, the principles of international law [Wright] would like to see established’¹¹ by the Tribunal. Wright responded as follows:

1. The definition of crimes in Article VI of the protocol is declaratory of preexisting international law.
2. Individuals are subjects of international law in the sense that international law confers upon them certain rights and holds them liable for certain crimes.
3. The individual cannot avoid responsibility for his acts on the ground that they were authorized by a government of the State for which the government purporting to act lacked power under international law to give such an authorization.
4. States lack power under international law to authorize the exercise of rights of war except in necessary self defense or as permitted by appropriate international procedures.¹²

In exploring Biddle’s role on the Tribunal, this article will also examine how Nuremberg fulfilled Wright’s ambitions for international law.

II. RELEASE, SUMMARY PUNISHMENT, OR TRIAL?

Even before the War was over, the Allies were preparing to address the systematic atrocities perpetrated by Nazi Germany. The question was not whether those responsible for the War and its horrors should be held to account for their conduct; the question was how. ‘There were three different courses open to us when the Nazi leaders were captured: release, summary punishment, or trial,’ wrote Henry L. Stimson, Roosevelt’s Secretary of State. ‘Release was unthinkable; it would have been taken as an admission that there was here no crime.’¹³ That left summary punishment or trial. Whatever the chosen course, the U.S. Office of Strategic Services (OSS), the precursor to the Central Intelligence Agency, was ready. OSS personnel had been on the ground throughout the war, collecting evidence of Nazi repression, murder, torture, rape, persecution, concentration camps, and a litany of other Holocaust-related horrors in anticipation of a post-war reckoning.¹⁴ This section shows that the path to Nuremberg was by no

11 Biddle Collection, above n 2, Box 1, Journal, 3 October 3 1945.

12 Ibid.

13 Henry L. Stimson, *The Nuremberg Trial: Landmark in Law*, *Foreign Affairs*, January 1947, 179.

14 Michael Salter, *US Intelligence, the Holocaust and the Nuremberg Trials: Seeking Accountability for Genocide and Cultural Plunder*, (Vol. 1, 2009) 161-220. The other Allied powers shared in this project. In January 1942, the very month that top SS brass were meeting at Wansee to discuss the Final Solution, Allied leaders declared their intention to place among their

means a certain one. Arguments that persist to this day about the legitimacy of Nuremberg long antedated the decision establish the war crimes tribunal; yet adjudication was ultimately viewed as the best course of action. This section will explain why.

In the Joint Declaration of Four Nations on General Security (Moscow Declaration) the Allies made clear their commitment to bringing war criminals to justice.¹⁵ Issued on November 1, 1943, the Declaration officially acknowledged Nazi ‘atrocities, massacres and executions’¹⁶ and pledged that the Allies would pursue those responsible ‘to the uttermost ends of the earth and . . . deliver them to their accusers in order that justice may be done.’¹⁷ Where a specific territorial nexus with crimes could be established, the perpetrators would ‘be brought back to the scene of their crimes and judged on the spot by the peoples whom they ha[d] outraged.’¹⁸ Such crimes would be dealt with in municipal legal fora.¹⁹ Where offenses had ‘no

principal war aims the punishment, through the channel of organized justice, of those guilty and responsible for these crimes, whether they have ordered them, perpetrated them, or in any way participated them. *Resolution by the Allied Governments Condemning German Terror and Demanding Retribution*. 12 January 1942. British and Foreign Papers, 1940-42, 144 (Her Majesty's Stationery Office, 1952). The following year, the allies established the United Nations Commission for the Investigation of War Crimes, a body that bore the name of the United Nations two years before the Charter of the organization even came into force. Timothy L.H. McCormack, *From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime*, in Timothy L.H. McCormack and Gerry J. Simpson, (eds), *The Law of War Crimes: National and International Approaches* (1997) 33, 57; *United Nations War Crimes Commission: 1943-1949*, United Nations Archives, Predecessor Archives Group, PAG-3/Rev. 1, 1987, i-iii, United Nations, <http://archives.un.org/ARMS/sites/ARMS/uploads/files/Finding%20Aids/Predecessors/ag-042%20UNWCC.pdf>, at 16 August 2012.

15 *US Department of State Bulletin*, Vol. 9 (1943) 308, Avalon Project, <http://avalon.law.yale.edu/wwii/moscow.asp> at 16 August 2012.

16 *Ibid.*

17 *Ibid.*

18 *Ibid.*

19 From 1947 to 1949, the United Nations War Crimes Commission reported on the more significant war crimes proceedings of WWII. The result was a fifteen-volume series, *Law Reports of Trials of War Criminals Selected and Prepared by the United Nations War Crimes Commission* (1947-49). Most of the reported trials were held in military tribunals convened by the occupying powers. Others were held in the municipal courts of liberated states (see eg *Trial of Kriminalsekretär Richard Wilhelm Hermann Bruns and two others*, Eidsivating Lahmannsrett and the Supreme Court of Norway (29 March and 3 July 1946) Vol. III 15 (torture as a war crime); *Trial of Wilhelm Gerbsch*, Special Court in Amsterdam, First Chamber (28 April 1948) Vol. XIII, 131 (defendant intentionally committed terrorism against Netherlanders and against persons through whom the interest of the Netherlands was or could be harmed.) *Ibid* 132.) The series also reported on domestic legislative measures passed for the purpose of trying war criminals (eg *Norwegian Law Concerning Trials*

particular geographical localization' perpetrators would 'be punished by joint decision of the government of the Allies.'²⁰ But how would that joint decision be made?

At the Second Quebec Conference (1944), Churchill and Roosevelt agreed that summary punishment was the appropriate course of action against high officers of the Third Reich. No trials were necessary: Germany had perpetrated unprecedented atrocities during the war, and the fact that the principal criminals possessed the authority to order and orchestrate them was all the proof of guilt the Allies needed. Churchill wrote, 'these persons should be declared, on the authority of the United Nations, to be world outlaws'.²¹ As such, they were to be punished in whatever way the Allies saw fit. Trial was both unnecessary and inappropriate for Nazi leadership because, Churchill argued, 'the question of their fate is a political and not a judicial one.'²² Punishment, according to Roosevelt's advisor Henry Morgenthau Jr., ought to be exemplary and severe.²³

The Soviet Union was an early and vigorous advocate of adjudication, not because it was committed to fair judicial process, but because of the

of War Criminals, Vol. III, p. 81.) According to one estimate, by 1950 almost 10,000 persons had been tried for war crimes in domestic legal fora. M. Cherif Bassiouni, *International Criminal Law* (3rd ed, Vol. III, 2008) 307. By 1988, over 91,000 individuals had been tried in German courts for WWII war crimes. Of them, about 6,500 were convicted. Axel Marschik, *The Politics of Prosecution: European National Approaches to War Crimes* in Timothy L.H. McCormack and Gerry J. Simpson (eds), *The Law of War Crimes: National and International Approaches* (1997) 66, 74-5.

20 Above n 15.

21 Winston Churchill, Draft of a Suggested Telegram to be Sent by the President and the Prime Minister to Marshal Stalin in *Foreign Relations of the United States: The Conference at Quebec, 1944*, (1972) 489 (hereinafter *Draft Churchill Memorandum*). See also, Memorandum by the British Lord Chancellor (Simon): Major War Criminals, 4 September 1944, in *ibid* 91-93. The Draft Churchill Memorandum adopts the position advocated by the Lord Chancellor in his memorandum on major war criminals.

22 *Draft Churchill Memorandum*, above n 21, 489. There was also a strategic element to this argument. By treating high-level Nazi officials differently from the majority of war criminals, he hoped to isolate the upper echelons of Nazi leadership from the masses of German foot soldiers. If the average German soldier knew that he would be afforded a fair trial in his home country as opposed to swift and summary punishment, he would be less likely to fight as desperately as his superiors, thus preventing the prolongation of the war. *Ibid* 490.

23 Morgenthau advocated the summary execution of major war criminals by a firing squad made of United Nations soldiers. Memorandum from Henry Morgenthau Jr. to President Roosevelt, 5 Sept. 1944 in Bradley F. Smith (ed), *The American Road to Nuremberg: The Documentary Record* (1982) 27-28.

propagandist ends to which it could turn a show trial on so grand a scale.²⁴ By January 1945, President Roosevelt had begun leaning toward adjudication, albeit for different reasons. His advisors cautioned that summary execution of top Nazi brass would ensure their immediate martyrdom in Germany and create the appearance that the Allies were no more respectful of law and justice than the Nazis had been. What was more, adjudication ‘would make available for all mankind to study in future years an authentic record of Nazi crimes and criminality.’²⁵ There were lessons to be learned from the past. A trial would preserve them for posterity. Britain remained skeptical of the propriety of a trial. ‘If the method of public trial were adopted,’ Sir Alexander Cadogan wrote, ‘the comment must be expected from the very start to be that the whole thing is a ‘put-up-job’ designed by the Allies to justify a punishment that they have already resolved on.’²⁶

Even more distressing to public opinion, though, would have been summary execution. In a memorandum to the Allies of 30 April 1945 the

24 The Soviet member of the Tribunal, Major General Nikitchenko, Vice-Chairman of the Soviet Supreme Court, had presided over numerous show trials in Russia during the 1930s. Michael J. Bazylar, *The Role of the Soviet Union in the International Military Trial at Nuremberg* in Herbert R. Reginbogin and Christoph J.M. Safferling (eds) *The Nuremberg Trials: International Criminal Law Since 1945* (2006) 45. Indeed, Robert Jackson commented of Soviet participation, ‘This is not an ordinary trial. Some of the proprieties went by the way when General Nikitchenko. . . was made a member of the Tribunal. Biddle Collection, above n 2, Box 1, Meeting in Mr. Biddle’s Residence, Sunday, 21 October 1945, p. 2. As early as 1942, the Soviet government was pledging to bring major Nazi leaders to trial when the war was over. Interestingly, the stated purpose of adjudication was to provide the Soviet public with the retribution they demanded through public trial and harsh punishment. Letter from V. Molotov, Soviet Commissar for Foreign Affairs, to M. Z. Fierlinger, Czech Minister, 14 October 1942, Avalon Project, <http://avalon.law.yale.edu/imt/jack01.asp#2> at 16 August 2012. One of the most startling moments at Nuremberg (and certainly the most discreditable) came when the Soviet prosecutor attempted to blame the Soviet-led massacre of nearly 15,000 Poles at the Katyn Forest on the accused. Persico, above n 2, 358-9.

25 Memorandum from Henry Stimson, Francis Biddle, and Edward R. Stettinius, Jr. to President Roosevelt, 22 January 1945, Avalon Project, <http://avalon.law.yale.edu/imt/jack01.asp#2> at 16 August 2012.

26 Sir Alexander Cadogan, Aide-Memoire from the United Kingdom to the United States, 23 April 1945, Avalon Project, <http://avalon.law.yale.edu/imt/jack02.asp>, at 16 August 2012. The British alternate for the Tribunal, Sir Norman Birkett, later remarked in a different spirit that the proceedings at Nuremberg were intended to be a world object lesson. . . and anything which brought home to the world at large, or the English public, in particular, the importance of the trial would have a good effect upon public opinion. Biddle Collection, above n 2, Box 1, Notes of Tenth Organizational Meeting (October 14, 1945, 3:00 p.m.) p. 17.

United States made the case for adjudication.²⁷ The United States argued that '[n]o principle of justice is so fundamental in most men's minds as the rule that punishment will be inflicted by judicial action.'²⁸ True, the legal right to summarily execute war criminals existed under the laws of war, but here public adjudication was preferable to the isolation of the firing squad. The war had been public; the reckoning that followed ought to be public, too. A trial would serve as a deterrent to future crimes and would raise international standards of conduct. By revealing the scope and scale of German aggression, a fair public trial would underscore the moral rectitude of the Allied cause and discredit totalitarianism.²⁹ Most importantly for the immediate future, a fair and expeditious trial would develop legal and judicial institutions in Germany while 'bring[ing] home the truth to those Germans who remain[ed] incredulous about the infamies of the Nazi regime.'³⁰ To pursue retribution for its own sake would be to squander the many opportunities that a fair trial presented for the development of law, reconciliation, and peace.³¹

In the memorandum of 30 April, the United States anticipated many of the aspirations of the system of international criminal law to which the Nuremberg Tribunal was a precursor:³² deterrence of future crimes;³³ the expression of the world community's condemnation of criminal conduct;³⁴

27 Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders, 30 April 1945, Avalon Project, <http://avalon.law.yale.edu/imt/jack05.asp>, at 16 August 2012.

28 Ibid.

29 Ibid.

30 Ibid.

31 Benjamin Ferencz, chief prosecutor of the largest murder trial in history, that of the *Einsatzgruppen* (Hitlers killing squads), framed the problem of retribution as follows: If you decide to shoot people, the argument becomes, Whom are you going to shoot, and when do you stop shooting? Nuremberg, A Prosecutors Perspective in Belinda Cooper (ed), *War Crimes: The Nuremberg Legacy* (1999) 33.

32 For a rich discussion of the Nuremberg Tribunal and the objectives of international criminal law, see Gerry J. Simpson, War Crimes: A Critical Introduction in Timothy L.H. McCormack and Gerry J. Simpson (eds) *The Law of War Crimes: National and International Approaches* (1997) 5-30.

33 Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (2011); Payam Akhavan, Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities? (2001) *American Journal of International Law* 7; David Wippman, Atrocities, Deterrence, and the Limits of International Justice (1999) *Fordham International Law Journal* 473; Johannes Andenaes, *Punishment and Deterrence* (1974).

34 Mirjan Damaska, What is the Point of International Criminal Justice? (2008) *Chicago-Kent Law Review* 300.

the allocation of individual guilt;³⁵ the establishment of an historical record of atrocities;³⁶ the cultivation of a rule of law in post-conflict society;³⁷ and, indeed, retribution.³⁸ The memorandum succeeded in its immediate objective of persuading Britain to support and participate in an international war crimes trial.³⁹ From June to August 1945, representatives of the Four Powers (the United States, the United Kingdom, the Soviet Union, and France) convened an international conference in London for the purpose of deciding the law and procedure to be applied against the major German war criminals. Unprecedented criminality demanded unprecedented justice.

III. EX POST FACTO LAW?

At the heart of the crimes to be confronted at Nuremberg was what Winston Churchill called ‘a crime without a name.’⁴⁰ Rafaël Lemkin named it ‘genocide.’⁴¹ This atrocity, along with the crime of waging an aggressive

35 Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (2000); Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (1997).

36 Lawrence Douglas, *History and Memory in the Courtroom: Reflections on Perpetrator Trials*, in David A. Blumenthal and Timothy L.H. McCormack (eds), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?* (2008) 95; Susan Haack, *Epistemology Legalized: Or, Truth, Justice, and the American Way* (2004) *American Journal of Jurisprudence* 43 (on the perils of judicial historiography); Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (1997). Notwithstanding the lofty aspirations of the 30 April memorandum, on one occasion the French alternate for the Nuremberg Tribunal, Judge Robert Falco, objected to the length of the Tribunals draft judgment, saying, we are judges and not historians. Biddle Papers, Box 14, Notes of Third Conference on Opinion (17 July 1946).

37 Erik G. Jensen, *Justice and the Rule of Law in Charles Call* (ed), *Building States to Build Peace* (2008) 119; Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda* (2000) *New York University Law Review* 1221.

38 Graham T. Blewitt, *The Importance of a Retributive Approach to Justice* in David A. Blumenthal and Timothy L.H. McCormack (eds) *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?* (2008) 39.

39 British Memorandum, 28 May 1945, Avalon Project, <http://avalon.law.yale.edu/imt/jack06.asp> at 16 August 2012 (the United Kingdom Government had become convinced of the desirability of proceeding along the general lines outlined in the American proposal). Aide Memoire from the United Kingdom, 3 June 1945. Available at <http://avalon.law.yale.edu/imt/jack07.asp> at 16 August 2012 (His Majestys Embassy are instructed to inform the State Department that His Majestys Government have now accepted in principle the United States draft as a basis for discussion by the representatives appointed by the Allied Governments to prepare for the prosecution of war criminals.).

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

41 Lemkin was a Polish Jew who fled his homeland in 1939. He was a tireless campaigner for the development of international rules prohibiting genocide and advised the Secretary-

war, became one of the focal points of the Four Powers' efforts in developing the International Military Tribunal. Sir David Maxwell Fyfe made it clear from the outset of the London conference that legal clarity was essential to the adjudication of the crimes: 'What we want to abolish at the trial is a discussion as to whether the acts are violations of international law or not. We declare what the international law is so that there won't be any discussion on whether it is international law or not.'⁴² The resulting Charter for the International Military Tribunal attempted to do precisely that, declaring that the Tribunal had jurisdiction over the following offenses, for which there would be personal responsibility:

(a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection

General of the United Nations on the drafting of the Genocide Convention. *Ibid.* at 24-30. In addition to the six million Jews (two-thirds of European Jewry) murdered by Nazi Germany, it is estimated that between 200,000 and 250,000 disabled, three million ethnic Poles, between 250,000 and 1.5 million Gypsies (250 of which were children used in a Zyklon-B experiment at Buckenwald), and 3,000 to 9,000 homosexuals were killed. Steven Lipman, Hitlers Other Victims, *Jewish Week*, 2 May 1997, 30. *See also* Gunnar Heinsohn, What makes the Holocaust a uniquely unique genocide? (2000) *Journal of Genocide Research* 411.

42 International Conference on Military Trials, Minutes of Conference Session of 29 June 1945, Avalon Project, <http://avalon.law.yale.edu/imt/jack17.asp> at 16 August 2012.

with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.⁴³

The category of war crimes was not particularly contentious during the London Conference, as it had precedents in customary international law and treaty law, namely, the Hague Convention Respecting the Laws and Customs of War on Land (1907)⁴⁴ and the Geneva Convention relative to the Treatment of Prisoners of War.⁴⁵ Under these treaties, the person, property and dignity of civilians and prisoners of war alike were to be treated with all due care and respect. Thus the substantive content of the offense did not undergo substantial revision during the Conference.⁴⁶

The category of crimes against peace was more contentious even though it had an indirect precedent in international law under the 1928 Kellogg-Briand Pact. Parties to that treaty, including Germany, had pledged to ‘condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.’⁴⁷ It had effectively outlawed recourse to war unless in self-

43 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(c), 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter IMT Charter]. Available at Avalon Project, <http://avalon.law.yale.edu/imt/jack60.asp> at 16 August 2012.

44 Convention Respecting the Laws and Customs of War on Land, 18 October 1907, 36 Stat. 2277. Available at International Committee of the Red Cross, <http://www.icrc.org/ihl.nsf/full/195> at 16 August 2012.

45 Geneva Convention relative to the Treatment of Prisoners of War, 27 July 1929, 118 LNTS 343. Available at International Committee of the Red Cross, <http://www.icrc.org/ihl.nsf/full/305?opendocument> at 16 August 2012. In particular, the Nuremberg Tribunal held that crimes defined by Article 6 Section (b) of the Charter were already recognized as war crimes under international law by Articles 46, 50, 52 and 56 of The Hague Convention of 1907, and Articles 2, 3, 4, 46, and 51 of the Geneva Convention of 1929. That violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument. Judicial Decisions: International Military Tribunal (Nuremberg), Judgment and Sentences (October 1, 1946) (1947) *American Journal of International Law* 172, 248 (Judgment of the Nuremberg Tribunal). The Judgment is also available online at Avalon Project, http://avalon.law.yale.edu/subject_menus/judcont.asp at 16 August 2012.

46 An early draft proposal defined war crimes as violations of the laws, rules or customs of war. Such violations shall include murder and ill-treatment of prisoners of war: atrocities against and violence towards civil populations: the deportation of such populations for the purpose of slave labour: the wanton destruction of towns and villages: and plunder: as well as other violations of the laws, rules and customs of war. Redraft of Charter Submitted by British Delegation, 23 July 1945, Avalon Project, <http://avalon.law.yale.edu/imt/jack45.asp> at 16 August 2012.

47 Treaty between the United States and other Powers Providing for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), 27 August 1928, 46 Stat.

defense, making warfare an unlawful method by which to execute state policy. In addition, the prohibition of wars of aggression had deep roots in customary international law, from the Scholastic lawyers' concern with just war theory to Grotian and Vattelian writings on *jus ad bellum*.⁴⁸ However, the Nuremberg Charter did nothing to define a war of aggression. This was deliberate. The Soviets knew that they themselves might be considered guilty of crimes against peace as a result of the Ribbentrop-Molotov Pact, a secret non-aggression agreement wherein the two states divided Europe into spheres of influence.⁴⁹ So for the sake of the Charter, the Four Powers were content to paper over the cracks in the category of crimes against peace with the hazy notion of 'wars of aggression'.⁵⁰

The Charter also introduced an altogether new category of offense into international law: crimes against humanity. In order to constitute a crime against humanity, 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population' had to occur before or during the war.⁵¹ Why, though, was this category even necessary?⁵² At first glance, it seems redundant in light of the Article 6(b)

2343. Also available at Avalon Project, http://avalon.law.yale.edu/20th_century//kbpact.asp at 16 August 2012. See also J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (6th ed, 1963) 406-12.

48 Stephen C. Neff, *War and the Law of Nations: A General History* (2006) 49-82, 314-56; Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (1999) 51-108; William C. Bradford, *International Legal Regimes and the Incidence of Interstate War in the Twentieth Century: A cursory Quantitative Assessment of the Associative Relationship* (2001) *American University International Law Review* 647, 666-721; John F. Murphy, *Crimes against Peace in George Ginsburg and Vladimir Nikolaevich Kudriavtsev* (eds), *The Nuremberg Trial and International Law* (1990) 121.

49 Henry Kissinger, *Diplomacy* (1994) 359-68. For Soviet views of the definition of aggression under the Charter of the Tribunal, see Minutes of Conference Session, 25 July 1945, Avalon Project, <http://avalon.law.yale.edu/imt/jack51.asp> at 16 August 2012.

50 In discussing the draft judgment of the Tribunal, Judge de Vabres urged his colleagues to abstain from any definition because the notion of aggressive war was too dependent on the precise context in which hostilities occurred. Biddle Collection, above n 2, Box 14, Notes of Third Conference on Opinion (17 July 1946). Biddle himself resisted elaborating on the definition of aggression on the ground that it was dangerous and academic and bad international law. *Ibid*.

51 For discussion, see Antonio Cassese, *International Criminal Law* (2003) 69-71. The temporal nexus between war and crimes against humanity has begun to disappear. See text beginning at n 84 below.

52 Ian Brownlie has written of the two, The category of war crimes was certainly orthodox law in 1945, and crimes against humanity were to a great extent war crimes writ large. *Principles of Public International Law* (5th ed, 2001) 566.

prohibition of war crimes. However, the category was far from superfluous. It was meant to fill two jurisdictional gaps in international law. The first gap it filled was the lack of a robust legal regime protecting civilians from deliberate harm in wartime. The second had to do with the singular nature of crimes against German nationals. The category of crimes against humanity enabled the Allies to address the horrors perpetrated by Germany, within Germany, against German citizens, and in compliance with German law. It would not be enough for a Hermann Göring to defend himself by saying, '[T]hat was our right! We were a sovereign State and that was strictly our business.'⁵³ Crimes against humanity were now the business of all states. The source of offense was not the law of nations, according to the United Kingdom, but rather a transcendent 'law of humanity'.⁵⁴

This category of offense was most vulnerable to the charge of *ex post facto* lawmaking, and the members of the Tribunal appear to have known it. It was difficult to assert that the Charter was simply declaratory of existing international law while it elaborated so novel a category.⁵⁵ Yet throughout the War, the Allies expressed concern that prevailing norms might not suffice when it came to holding the enemy accountable for atrocities against his own people.⁵⁶ The notion of crimes against humanity represented the high water mark of the Tribunal's challenge to traditional conceptions of state sovereignty. Conduct by a state towards its own citizens within its own borders which was thoroughly permissible and, in fact, *required* by domestic law could be declared criminal under international law and its perpetrators held to account in an international legal forum.

Antonio Cassese suggested that this approach discomforted the judges of the Nuremberg Tribunal, as they shied away in the judgment from addressing whether crimes against humanity constituted an *ex post facto* legal category, focusing instead on the antiquity of the category of crimes against

53 G. M. Gilbert, *Nuremberg Diary* (1961) 39.

54 Draft Showing Soviet and American Proposals (in Parallel Columns), 1945, Avalon Project, <http://avalon.law.yale.edu/imt/jack23.asp> at 16 August 2012.

55 Shortly after the trial, one scholar characterized the category as a legal innovation of the first magnitude. F.B. Schick *The Nuremberg Trial and the International Law of the Future* (1947) *American Journal of International Law* 770, 785.

56 See discussion in Egon Schwelb, *Crimes Against Humanity in Mettraux*, 120 at 125-26. Philosopher Jean François Lyotard wrote of the Holocaust, Suppose that an earthquake destroys not only lives, building, and objects but also the instruments used to measure the earthquake. Cited in Marion A. Kaplan, *Between Dignity and Despair: Jewish Life in Nazi Germany* 229 (1998). In the aftermath of that earthquake, the Four Powers had to develop a juridical framework within which to make legal sense of the horrors that had just transpired.

peace.⁵⁷ Yet memoranda exchanged by the members of the Tribunal suggest otherwise. In notes taken on 16 March 1946, Biddle wrote, “The maxim of nullum crimen nulla poena is not a limitation of sovereignty and in certain circumstances and particularly in International Law it may be just for the sovereign power to treat some acts as crimes which had not been designated as crimes at the time they were committed.”⁵⁸ He was agreeing with a memorandum circulated by the French member of the Tribunal, Donnedieu de Vabres, Professor of Law at the University of Paris. After an exhaustive review of the principle *nullum crimen nulla poena sine lege* from Roman antiquity to the modern era, de Vabres concluded that it was a doctrine unique to domestic legal systems, a doctrine that found its articulation only during periods of legal codification as a check on the power of the sovereign. If the international community wished to recognize an analogous doctrine for international law, it would have to codify international criminal law.⁵⁹ In the meantime, to insist on applying the principle to the defendants at Nuremberg would be to disregard the higher interests of justice and the common interest of States that the Tribunal was meant to serve.⁶⁰

57 For discussion, see Antonio Cassese, *International Criminal Law* (2003) 69-71; *ibid*, *International Law* (2002) 248-49. To Henry Stimson, the notion of *ex post facto* law was an ill fit for defendants such as those before the Tribunal. That concept is based on the assumption that if the defendant had known that the proposed act was criminal he would have refrained from committing it. Nothing in the attitude of the Nazi leaders corresponds to that assumption; their minds were wholly untroubled by the question of their guilt or innocence. The Nuremberg Trial: Landmark in Law (1947) *Foreign Affairs* 179, 183.

58 Biddle Collection, above n 2, Box 14. See also the views of American alternate John J. Parker in the meeting of 19 August 1946 (Maxim *nulla crimen* is not a limitation on sovereignty and does not apply here) in *ibid*.

59 Biddle Collection, above n 2, Box 14, Note by Donnedieu de Vabres (Nous souhaitons vivement que, dans le plus bref delai possible, il sinstitute une codification du droit penal international).

60 *Ibid*. (Mais attendre pour châtier les grands criminels de guerre que cette codification sit vu le jour, ce serait sacrifier a un scrupule, sans fondement historique ni rationnel, les exigences supérieures de la justice et lintérêt commun des Etats.) The Russian member was far less rigorous in his approach. In a two-hour peroration to the other members of the Tribunal, Nikitchenko argued that the Charter of the Tribunal introduces many new things in [the] field of international law such as criminal responsibility for actions that were previously announced but not made punishable. . . . [The] Tribunal [is] not an institution to protect old law and to shield old principles from violation. Biddle Collection, above n 2, Box 15, Notes from Session on Opinion, 15 August 1946. In a letter to Wechsler of 10 July 1946, Biddle confided that for all the Members arguments about *nullum crimen*, I find no improvement in the vagueness of the English mind, nor in the tight logic of the French. I sometimes feel that the Russians understand what it is all about better than any of us. Biddle Collection, above n 2, Box 1. The comment suggests a cynical approach to the issue

IV. INDIVIDUAL RESPONSIBILITY: ‘THE VERY ESSENCE OF A POSITIVE AND MORAL INTERNATIONAL LAW’⁶¹

Essential to justice at Nuremberg was the establishment of individual criminal responsibility for violations of international law. Reflecting on his work on the Tribunal, Biddle wrote,

There is a moral value in fixing responsibility in a field of anonymous responsibility. A state, after all, like a corporation, is a fictitious body. . . Of course the representatives of a state under certain circumstances are protected under the doctrine of international comity. But authors of acts criminal under international law cannot shelter themselves behind their official positions. If the state moves outside of its competence under international law the authority to act cannot create immunity.⁶²

It should not have been altogether surprising, then, when Robert Jackson told the Americans at Nuremberg that the defendants were being cooperative. ‘They did not dispute the fact that crimes had been committed,’ he said. ‘Their defense would be that a particular individual did not participate. They would attempt to lay everything on Hitler.’⁶³ Holding the defendants individually accountable for their illegal conduct during the war would require that the Tribunal pierce the veils of command responsibility and the act of state doctrine. This section will examine Biddle’s role in doing precisely that, taking into account the way his views on individual responsibility for violations of international law were shaped by his experiences as Attorney General of the United States.

Francis Biddle had served as Attorney General under President Roosevelt from 1941 to 1945. Only a few weeks after he was sworn into office, the Japanese attack on Pearl Harbor launched the United States into the Second World War. As Attorney General, Biddle was responsible for representing the U.S. government in some of the most controversial causes of the day, not least of which was the *Nazi Saboteurs* case, *Ex parte Quirin*.⁶⁴ The case

of ex post facto law, but it must be remembered that Biddle penned the letter to Wechsler more than a week before coming around to de Vabres position. See above n 59.

61 Biddle, *The Nürnberg Trial in Mettraux* 200, 207 (referring to the Tribunals ruling that the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state.)

62 *Ibid* 207

63 Biddle Collection, above n 2, Box 1, Notes of Meeting in Mr. Biddles Residence, Sunday, 21 October 1945.

64 317 US 1 (1942).

involved seven German-born men who landed secretly on American shores in 1942. German submarines had dropped them off the coasts of New York and Florida. Wearing German Marine Infantry uniforms, the men made their way ashore, armed with explosives and carrying maps of strategic facilities. Disguising themselves as civilians, they set out to carry out their orders from the German High Command: to destroy war industry facilities in the United States.⁶⁵ However, one of the saboteurs informed the Federal Bureau of Investigation of the plot. Ten days after the men landed, they were rounded up and taken into custody by the FBI.

The Attorney General found himself in a bind. If he tried the men in federal court, he might not be able to prove the charge of attempted sabotage because the defendants were not close enough to undertaking the planned attack to meet the elements of the offense under federal criminal law.⁶⁶ Perhaps worse, he might also be required to disclose that the plot had not been foiled through capable investigative work on the part of the FBI, but by sheer luck: one of the saboteurs had turned informant on the others.⁶⁷ After consulting with President Roosevelt and the Department of Defense, Biddle decided to hand the men over to the military for trial outside the regular courts. On July 2, President Roosevelt appointed a special military commission to try the men swiftly and secretly, with trial beginning as early as the next week. Biddle would serve as prosecutor alongside Major General Myron Cramer, Judge Advocate General of the U.S. Army.⁶⁸

Seven of the eight accused sought writs of habeas corpus from the Supreme Court of the United States, arguing that they could not be tried by a military commission while the regular courts of the United States were still open.⁶⁹

65 Ibid.

66 Francis Biddle, *In Brief Authority* (1962) 328.

67 The New York Times reported, Praise for the swift and sure work of the Federal Bureau of Investigation was heard on all sides. . . . FBI officials maintained their customary silence, refusing to comment on reports that their agents had infiltrated into the German secret service or had stationed men to watch the landing of the saboteurs. Saboteurs Face Military Justice; Inquiry Widens: Biddle Statement is Taken to Mean that Army Will Try at Least Six Invaders, *New York Times*, 30 June 1942, 1.

68 Lewis Woods, Army to Try 8 Nazi Saboteurs: President Names 7 Generals on commission to Hear Case Beginning Wednesday, *New York Times*, 2 July 1942, 1; Secrecy Shrouds Saboteurs Trial: Comment is Refused on the Procedure, Set by Order to Be Started Today, *New York Times*, 7 July 1942, 25.

69 This argument had its basis in the Civil War case of *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), in which the U.S. Supreme Court granted the writ to a civilian in Indiana who had been sentenced to death by a military commission for subversive activities. The Supreme Court held that as long as the regular civil courts were open, Milligan, a civilian, was entitled to trial in them. The Constitution of the United States is a law for rulers and

The Court rejected that argument on the ground that the accused were combatants and were therefore subject to trial by military authorities. It reasoned,

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.⁷⁰

It is worth here noting that the military commission appointed by the President had jurisdiction over the defendants by merit of their status as combatants in time of war. The law to be applied by the commission was the international law of war as codified in treaties and enshrined in customary law. To Biddle, the Nuremberg Tribunal was convened in this vein:

In the *Saboteur* case as Attorney General I was assigned to take charge of the prosecution. My mail was filled with hundreds of indignant letters suggesting that the saboteurs should be immediately shot and not tried. So too in the Nürnberg case it was urged that what is loosely termed ‘political’ treatment would have been appropriate – i.e. execution or expulsion to some convenient Elba, without trial. . . Yet all standards of justice required some measure of trial even where ‘political’ methods are used.⁷¹

The policy arguments for the trial of the German saboteurs mirror those made for the trial of the Nazi war criminals at Nuremberg.⁷² More importantly, though, the trial of the saboteurs was an instance in which individuals were held judicially accountable for violations of the international laws of war. It was a fitting prelude to what was to come at

people, equally in war and in peace, the Court held, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. Ibid 71 U.S. 120-121.
70 *Ex parte Quirin*, 317 US at 31.

71 Biddle, above n 61, 201.

72 Above Section I. But while domestic due process requirements obligated the U.S. government to try the saboteurs, the laws of war would have permitted the Allies to summarily execute the Nuremberg defendants if they so wished.

Nuremberg and, perhaps, one of the reasons that President Truman appointed Biddle to the Tribunal.⁷³

One of the great achievements of the Nuremberg Tribunal was signaling to the society of states that the time had come to consider regulating states' conduct toward their nationals not only in time of war, but in time of peace.⁷⁴ Notwithstanding U.S. efforts to secure convictions for pre-war atrocities through conspiracy charges,⁷⁵ the Tribunal declined in its Judgment to hold the defendants responsible for crimes against humanity committed prior to the outbreak of the war.⁷⁶ As long as an individual's conduct occurred in time of international war, he could be held criminally liable for his conduct. Beyond that, the veil of sovereignty would remain drawn over the face of human rights violations.

The decades following the Tribunal's efforts have become what one scholar termed "The Age of Rights."⁷⁷ Immediately following the Tribunal's judgment, the United Nations General Assembly issued Resolution 95 (I), Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal,⁷⁸ directing the International Law Commission 'to treat as a matter of primary importance plans for the formation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nuremberg Tribunal and in the

73 Joseph Persico has suggested that Truman chose Biddle because he felt badly about having demanded Biddle's resignation from his position as Attorney General over the phone rather than in person. While Attorney General, Biddle had opposed Truman's candidacy for Vice President, so it made sense for Truman to appoint a more loyal person to lead the Department of Justice. Persico, above n 2, 61-63. This interpretation seems overly simplistic given Biddle's ample qualifications to serve the United States on the Tribunal.

74 Ratner and Abrams, above n 35, 6.

75 Biddle Collection, above n 2, Box 14, Secret Memorandum to Attorney General Tom C. Clark from Herbert Wechsler, 29 December 1944. For discussion of the crime of conspiracy at Nuremberg, see Jackson Nyamuya Maogoto, *State Sovereignty and International Criminal Law: Versailles to Rome* (2003) 90-95.

76 To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter. Judgment of the Nuremberg Tribunal, above n 46, 254.

77 Louis Henkin, *The Age of Rights* (1990) 13-15.

78 G.A. Res. --95 (I), U.N. GAOR, 1st Sess., pt. 2, at 1144, U.N. Doc. A/236 (1946).

judgment of the Tribunal.⁷⁹ The resultant Nuremberg Principles limited crimes against humanity to acts undertaken in conjunction with crimes against peace.⁸⁰ Nevertheless, the Nuremberg Principles would be central to the progressive development of international criminal law and international human rights law.⁸¹

V. THE LEGACY OF NUREMBERG

In assessing the legacy of any tribunal it is tempting to let the privilege of hindsight obscure the difficult context in which decisions were made. Too frequently, the tribunal's decision is taken for the totality of its jurisprudential achievement. It is hoped that this article has helped enrich the reader's appreciation of the turbulent context from which the Nuremberg Tribunal emerged and the troubled context in which it operated. In particular, this article has demonstrated the seriousness which the Members of the Tribunal considered the controversial issue of *ex post facto* law in applying the law of the Charter to the defendants. It has shown the energy with which the members challenged one another's views, as well as some of the compromises that resulted from this process of engagement. It has also shown that Francis Biddle, like his counterparts on the bench, was acutely aware that the Tribunal's function was not simply to adjudicate the recent past. It was also to serve as a model for the future, to progressively develop existing norms of international law, and to lay the foundation of a system of international criminal law that would bring to account perpetrators of war crimes and related atrocities.⁸² In this sense, the

79 Ibid.

80 Report of The International Law Commission, 5 U.N. GAOR, Supp. No. 12, at 14, U.N. Doc. A/1316 (1950). M. Cherif Bassiouni has explained the relationship between these categories of offense as follows: [T]hree charges were set forth in the Nuremberg Charter: crimes against peace, crimes against humanity, and war crimes. Crimes against humanity emerge from war crimes. The drafters were very careful in making sure that they were deemed to be an outgrowth of war crimes because of their concern with the principles of legality. This is why Article 6(c) states that crimes against humanity are those crimes that were committed in connection with one of the other two crimes within the jurisdiction of the court. Although the language seems somewhat confusing, its purpose was to establish a connection with the war. The International Criminal Court in Historical Context (1999) *Saint Louis-Warsaw Transatlantic Law Journal* 55, 60.

81 Rich discussions of Nuremberg's effect on the development of international criminal law can be found in Ratner and Abrams, above n 35 and Reginbogin and Safferling, above n 24.

82 Hans-Heinrich Jescheck, The Development of International Criminal Law after Nuremberg in Guénaél Mettraux (ed), *Perspectives on the Nuremberg Trial* (2008) 408, 409. The Soviets initially (and understandably) resisted these ambitions lest the principles enshrined at Nuremberg be turned against Stalins own policies. The members of the Tribunal were

work of the Tribunal was as much prospective as it was retrospective, fulfilling Biddle's vision of the Tribunal as having roots in the past and fruits that would ripen in the future.⁸³

In the decades following Nuremberg individual responsibility for crimes against humanity expanded well beyond the limits of international armed conflict, if only because of the seemingly boundless human capacity for atrocity.⁸⁴ The category of "crimes against humanity" is no longer firmly tethered to the other offenses of the Nuremberg Principles. The first significant step in this direction was the Convention on the Prevention and Punishment of the Crime of Genocide, which provides that genocide, 'whether committed in time of peace or in time of war, is a crime under international law which [states] undertake to prevent and to punish.'⁸⁵ Subsequent treaties have stipulated that policies of apartheid and forced disappearance are likewise crimes against humanity regardless of whether they accompany a state of war.⁸⁶ The independent character of crimes against humanity has been recognized under customary international law as well as in treaties. In 1995, the International Criminal Tribunal for the Former Yugoslavia notably held, 'It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed. . . customary international law may

particularly cautious about the potential ends to which the Soviet Union might put the trial. Biddle wrote in his diary, Many difficult problems. If we hold these organizations [i.e., the Gestapo and the S.S.] to be criminal it opens the door to the Russians – to everyone in fact – to shoot on proof of membership, referring to our judicial approval – not a very desirable result. Biddle Collection, above n 2, Box 1, Journal (4 October 1945).

83 Biddle Collection, above n 2, Box 1, Journal (October 2 1946). See discussion above at n 7.

84 Since the post-War period, states have been grappling with the Nuremberg Charter's tangled categories of 'war crimes' and 'crimes against humanity.' Matthew Lippman, *Crimes Against Humanity*, (1997) *Boston College Third World Law Journal* 171.

85 9 December 1948, 78 U.N.T.S. 277, Art. 1.

86 International Convention on the Suppression and Punishment of the Crime of Apartheid , 30 November 1973, 1015 UNTS 243; Inter-American Convention on the Forced Disappearance of Persons, 9 June 1994, OEA Doc. AG/RES. 1256 (XXIV-0/94). See also, *Draft Code of Crimes Against the Peace and Security of Mankind Seventh Report*, Mr. Doudou Thiam, Special Rapporteur, (1989) II Year Book of the International Law Commission 81, 86, ¶ 38, U.N. Doc. A/CN.4/419/Add.1 ('First linked to a state of belligerency, . . . the concept of crimes against humanity gradually came to be viewed as autonomous and is today quite separate from that of war crimes. Thus, not only the 1954 draft code but even conventions which have entered into force (on genocide and *apartheid*) no longer link that concept to a state of war.')

86 9 December 1948, 78 U.N.T.S. 277, Art. 1

not require a connection between crimes against humanity and any conflict at all.⁸⁷

This principle lies at the heart of Article 7(1) of the Rome Statute of the International Criminal Court. The Statute stipulates that crimes against humanity consist of certain acts undertaken ‘as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’.⁸⁸ The ‘attack’ need not be part of a broader war. It is sufficient that civilians be unlawfully targeted by any government, be it a foreign state’s or their own. The provenance of Article 7 can be directly traced to the work of the Nuremberg Tribunal. It is fitting, then, that Benjamin Ferencz, who at the age of 27 prosecuted a case before the Nuremberg Tribunal,⁸⁹ remarked before the International Criminal Court last year, ‘The most significant advance I have observed in international law has gone almost unnoticed; it is the slow awakening of the human conscience.’⁹⁰ Ferencz, by then 92 years old, was delivering the closing arguments in the case against Congolese war criminal Thomas Lubanga Dyilo.⁹¹ The Nuremberg Tribunal was instrumental in rousing the human conscience from its wartime slumber. It has been the project of international criminal law ever since to keep that conscience attentive, responsive, and engaged.

87 *Prosecutor v. Dusko Tadić*, Decision on the Def. Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, ¶ 151. See also Guénaél Mettraux, ‘Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda’ (2002) *Harvard International Law Journal* 237; Beth Van Schaak, The Definition of Crimes Against Humanity: Resolving the Incoherence (1999) *Columbia Journal of Transnational Law* 787.

88 2187 U.N.T.S. 90 (entered into force on 1 July 2002).

89 See above n 31.

90 ‘Ferencz Closes Lubanga Case for ICC’ (25 August 2011) Benjamin J. Ferencz: Law Not War, <http://www.benferencz.org/index.php?id=5&media=38> at 19 August 2012.

91 *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, 14 March 2012.

**The International Criminal Court, Drug Trafficking and Crimes
against Humanity: A local Interpretation of the Rome Statute**

Dr. Juan Carlos Sainz-Borgo¹

The International Criminal Court (ICC) represents the culmination of decades of work of the international community to establish a permanent entity that would prosecute and sanction the worst behaviors human being are capable of. This exercise was developed in three stages; (1) the negotiation of a comprehensive treaty that establishes a final catalog of international crimes: the Rome Statute, (2) the establishment of an international criminal tribunal that has the ability of prosecuting individuals, the International Criminal Court, and (3) the implementation of a new international organization that could monitor the fulfillment of the two previous steps, the Organization of States Parties.

Given it was such an ambitious project the process occurred relatively rapidly since the start of the negotiations of the Statute, establishing a record regarding how fast the international community managed to build this consensus compared to other courts (such as e.g. The International Tribunal for the Law of the Sea). This speed may be a sign of the growing maturity of international community to face fundamental challenges such as establishing a new criminal jurisdiction on a global scale.

As Thomas Boudreau argues in his essay “Law of Nations,” the “state-centric” paradigm of international law is no longer an accurate description or adequate explanation of emergent legal development and practices. However, the paradigmatic shift that the establishment of this International Criminal Court represents has required State Parties to take certain actions that could not be simply limited to the signing of the respective treaty, as if it were one more in the long list of multilateral obligations and that could be solved with the sole approval of the respective legislative powers and the international collaboration to ensure compliance with the functions of the Court. The “state-centric” legal paradigm, broken since World War II, is further shattered with the approval of the Rome Statute since it forsakes the nation- state as the sole owner of international responsibility, compel member states to adapt their criminal systems to incorporate these new features and avoid contradictions among the domestic and international systems. The international criminal responsibility of the individual before

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the International Criminal Court represents a profound shift on the development of the International Law paradigm. Thus, many states modified their legislation to make them compatible with this new legal paradigm like Argentina, (Ley No. 26.200, January 2007); Brasil, (Projeto de lei No. 301 2007); Canada (Crimes against Humanity and War Crimes Act 2000). Other states have approved special laws to allow compliance of these new legal responsibilities, without changing any further structure of the legal framework like Uruguay (Ley N° 18.026 October 2006) and the German International Criminal Code.²

Yet, a large group of states have neither modified internal laws nor approved special norms, leaving the causal interpretation and jurisdictional reach of the Rome Statute for now limited largely to a case by case bases. Even so, enlightening and educational examples can be found of national jurisdictions taking juridical measures to interpret and incorporate the provisions of the Statute.

The present article refers to the approval of the Supreme Court of Justice of the Bolivarian Republic of Venezuela judgments that determines drug trafficking related crimes to be within the definition of crimes prosecuted by the International Criminal Court. This decision has been confirmed in several opportunities by both the Criminal Appellate Chamber and the Constitutional Chamber of that Court, creating a, as will be argued below, dangerous precedent for the development of international criminal law as well as the fight against drug trafficking.

The aim of the article is to analyze this local interpretation of the Bolivarian Republic of Venezuela Supreme Court of Justice and to stress the way in which these local decisions, trying to locally interpret an international treaty, may cause serious problems for the future of the International Criminal Court.

1. The local interpretation

In March 2000, the Supreme Court of Justice of the Bolivarian Republic of Venezuela addressed the issue of Crimes against Humanity through a decision of the Criminal Appellate Chamber that was then confirmed by the Constitutional Chamber. In these decisions, drug related crimes were qualified as Crimes against Humanity.

²Information taken from, International Coalition for the International Criminal Court. <http://www.iccnw.org/?mod=romeimplementation&idudctp=20&show=all&lang=en> Accessed July 2012.

There is not an internationally recognized qualification that interprets drug related crimes or terrorism as crimes against humanity. The Rome Statute, in Article 7, does not include such an interpretation in any of its eleven parts. Neither do the Elements of Crimes approved for the Rome Statute.

There is a generous amount of treaties and agreements that show the will of the international community to eradicate crimes related to drugs, that spans through various countries and which stages and consequences exceed the simple fact of the consumption of a banned product that damages a population. But there is no unanimous qualification of this crime or consensus in the international community to qualify certain drugs related conducts as a criminal conduct, like drug trafficking.

This position of the highest Venezuelan court was built in two clearly defined stages. First, through the decision of the Criminal Appellate Chamber that referred to elements eminently internal and the Constitutional Chamber that used the elements contained in the Rome Statute to give ground to such argument of the criminal chamber. We will briefly go through both decisions.

In the Criminal Appellate Chamber the reporting judge, Angulo Fontiveros, in decision No.359 of March 28, 2000³, related to the case against two Venezuelan citizens condemned for the possession of 49.9 grams of cocaine, presents his argument into two great pillars: the constitutional regulation and the theory of legally protected assets.

To begin with, the Court bases its first argument in the eminently constitutional nature of the extension of the definition of crimes against humanity to include drugs related offenses. The decision cites Articles 29 and 271 of the current Venezuelan constitution as the basis for its argument and proposes them as a dialectic unity.

Article 29 of the 1999 Venezuelan Constitution establishes a special description of crimes listed within the same Article to which no statute of limitation is applicable. Thus, the constitution protects the victim of the crime from the passage of time that could protect the individual responsible of those crimes.

This is a breach of the general principle of the statute of limitations. Exceptions must be restrictively interpreted, as general principle of law.

³ <http://www.tsj.gov.ve/decisiones/scp/Marzo/359-280300-C99098.htm>. Accessed in July, 2011.

The crimes expressly listed in Article 29 of the Constitution are:

1. Crimes against humanity
2. Serious violations of human rights
3. War crimes

This paper is not going to analyze any further the content of the crimes previously mentioned and that are established in Article 29 previously cited, because it is not part of what we seek. However, it is important to clarify that the court decision takes advantage of the lack of definition of certain concepts like crimes against humanity that could be qualified as an open type of crime to match it with article 271 of the Venezuelan Constitution that has no direct relation with the previously mentioned.

With the exception of war crimes, established in the Geneva Convention and that are the basis of International Humanitarian Law, the drug related are not expressly defined as crimes against humanity or considered “serious” human rights violations.

When are we facing a serious violation? There is no legal definition for this assertion and jurisprudence of the Inter-American Court of Human Rights or the European Court of Human Rights have not made a scale on which actions are serious violations and which are less serious.

Moreover, Article 271 of the Constitution of the Bolivarian Republic of Venezuela establishes three direct mandates to the Legislative Branch:

First, it regulates the general principle of asylum, established in Article 69 of the constitutional text, preventing the state’s protection to those people responsible for crimes listed as: money laundering, drugs, International organized crime, acts against public property of other States and against human rights.

Second, it decrees the non-applicability of the statute of limitations to prosecutions against human rights violations, drug trafficking or actions against public assets, establishing seizure of the goods arising from those crimes as additional penalty to such activities.

Third, it establishes the judicial procedure to be applied in cases provided in this article.

Thus, it is important to stress that the Constitution approved but did not integrate all drug related crimes into Article 69. On the contrary, it described each criminal basic definition in a specific way. Moreover, it went back to

Article 29 and expands the list of crimes that are not affected by passage of time, adding to the list of crimes against patrimony that of drug-trafficking and reiterating violations of human rights.

In our opinion, this interpretation by the Supreme Court threatens legal certainty and the principle that penalties must be lawful, established in Article 1 of the Criminal Code. The decision casts aside the criteria expressed by International Criminal Law and human rights treaties signed and ratified by Venezuela, which we will comment on later in this essay.

However, we would like to mention two comments that have been published in Venezuela regarding this matter.

First, the former president of the Supreme Court of Justice, Cecilia Sosa Gomez, has expressed:

Viewed the arguments content in the decision transcribed we can affirm that the Criminal Appellate Chamber neither has constitutional nor legal basis to support its arguments, except for stressing the seriousness of drug-trafficking crime. Constitutional Articles 29, 271 and 257 at no time mentioned or addressed drug-trafficking crime, defined in the Organic Law of Narcotics and Psychotropic Substances (OLNPS), as a crime against humanity and neither the Rome Statute establishes it as such⁴

Furthermore, professors Jose Malagueña Rojas and Francisco Ferreira, denied that such crimes could have any relation to crimes provided in the Organic Law of Narcotics and Psychotropic substances (OLNPS) due to the fact that the source within international law is totally different and cannot be linked or mixed.⁵

This first part represents the local argument that could be debated, as we previously mentioned. It only uses domestic legal instruments and does not make any interpretation of International Law, which will happen in the decision of the Constitutional Chamber.

The reporting judge of the Constitutional chamber, Jesus Eduardo Cabrera Romero, drafted a strong argument in which he defines in a doctrinal way

⁴ Sosa Gómez, Cecilia. (2004) Crímenes de Lesa Humanidad . Page 454. En, *Fundación Venezuela Positiva*. (2004) Lesa humanidad. Editorial Gráficas Armitano. Caracas. Translated by the author?

⁵ Malagueña Rojas, José L. y Ferreira de Abreu, Francisco. (2004) *Los Crímenes de Lesa Humanidad y el Delito de Tráfico de Drogas Ilícitas*. Revista CENIPEC 23. Mérida.

drug-trafficking crime as a crime against humanity and then, as an example, introduces provisions that in the Rome Statute regulate the matter of crimes against humanity.

The Constitutional Chamber directly interpreted the text of the Rome Statute when it stated that "... Article 7 lists crimes against humanity, and letter K of such law, defines conducts that in the opinion of this chamber encompasses the illicit traffic of drugs." The transcription of Article 7, letter K reads as follows:

"k) Other inhuman acts of similar character intentionally causing great suffering or serious injury to body or to mental or to physical health".

This quotation, directly extracted from the Rome Statute, is a law that in its context of application and given the human cruelty adapts to the times; it is the best way to keep the door open for the possibility of new heinous acts, perhaps involving new technologies. In short, the emphasis of the Statue is on *actions*, not *substances*.

The Elements of the Crimes included on the annexed to the Rome Statute for that Article are five:

1. That the author has caused through an inhuman act great suffering or serious injury to body or mental or physical health.
2. That such act had a similar character as to that of any other act referred to in paragraph 1, Article 7 of the Statute.
3. That the author was aware of the factual circumstances that determined the nature of the act.
4. That the conduct was performed as part of widespread or systematic attack against civilians.
5. That the author was aware that the behavior was part of a widespread or systematic attack against civilians or that he had the intention that such conduct was part of an attack of that kind.

In none of those five elements can subsume typical premises of drug trafficking or any of its related crimes. Particularly, number 4 and 5 require offenses being part of a "widespread or systematic attack" against civilians. A constitutive element of the crime of drug trafficking, by its very nature, however, is that is it selective; it does not seek a general harm to civilians. Its main engine is profit seeking by the drug dealer. It is not a direct attack to the population. We will develop this idea later.

Moreover, this interpretation of the Venezuelan Supreme Court of Justice contradicts the general rules of interpretation of International Law established in the Vienna Convention on the Law of Treaties, which is the result of the codification of the International Law Commission (ILC)⁶ of the United Nations. It contains international practices on the subject, as e.g. explained in Article 31 concerning the need of entirely interpreting the treaty, taking into account its object and purpose.

The object of the Rome Statute, per Article 1, is to establish an International Criminal Court to “exercise its jurisdiction over persons **for the most serious crimes of international concern**, as referred to in this Statute.”⁷

Thus, this court will only try crimes of the greatest international significance. Article 5 expressly lists: genocide, crimes against humanity, war crimes and the crime of aggression. Article 7 defines the scope of this crime:

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

The Article expressly defines as its general denominator, what signatory States defined as “attack to civilians”, which shall be understood as a line of conduct that implies multiple commission of acts mentioned in paragraph 1 against civilians, in accordance with the policy of a State or organization of committing such acts or to promote such policy.

Since the Constitutional Chamber refers to this Treaty, we must quote those interpreting rules that this International Agreement has. These rules are provided in Article 22 and to the effects of this paper, we will cite number 2:

Crime definition shall be strictly interpreted and shall not be extended or apply by analogy. In case of ambiguity, it shall be interpreted favoring the subject object to the investigation, trial or sentence.

⁶ Watts, Sir Arthur. (1999) *The International Law Commission. 1949-1998*. Volume I. y II The Treaties. Oxford University Press. First Edition 1999.

⁷ Emphasis added.

This would suggest that the argument that the Constitutional Chamber of the highest Venezuelan court tries to establish does not follow the spirit of the Rome Statute. and, moreover, it is actually in open contradiction with the provisions of the Statute of Rome.

Following the Rome Statute, we consider that qualifying drug trafficking crime as a worldwide scourge, and one that may cause serious harm to the population, cannot be framed as among the objectives of the International Criminal Court as a crime of the greatest gravity and importance for the international community, as we will see later.

Also, it is important to stress what professors Malagueña and Ferreira mentioned in the quoted article regarding the argument that supports the decision:

Premise A: Actions to sanction crimes against humanity have non-applicability of the statute of limitation (Article 29 of the Constitution).

Premise B: judicial actions towards sanctioning drug trafficking crimes have no statute of limitation. (Article 271 of the Constitution).

Conclusion: therefore, crimes provided in Article 34 of the Organic Law of Narcotics and Psychotropic substances are crimes against humanity.⁸

This line of reasoning of the highest court have in practice led regular courts and the Criminal Chamber of the Supreme Court of Justice to dismiss any “prosecuting benefits” that may apply to those involved in any drug related crime, such as “community service”, or home confinement, especially for minors.

Ratification of the Supreme Court’s position

This position of the Venezuelan Supreme Court is not isolated. On the contrary, it has been recurrently sustained in different ways. For example, the Constitutional Chamber of the Supreme Court of Justice, answering a court remedy against the decision of the Appellate Chamber of the Criminal Judicial Circuit of the State of Vargas, in August 2003, a little less than a year after the decision that laid the foundations for the binding

⁸ Malagueña y Ferreira. Ob. Cit. Page 102.

constitutional interpretation on crimes against humanity and treatment of “benefits during the process,” confirmed its position.

The latest interpretation modified the adopted criteria. However, the Constitutional Chamber subsequently denied such a change, thus creating a great deal of confusion about its application

Corollary of what has been presented, it is hard for this Chamber to overturn the decision of the Court of Appeals of the Criminal Judicial Circuit of the State of Vargas, on December 19, 2002, in which the petition for the court remedy was ruled out of order in *limine litis* for being part of the inadmissibility grounds provided in Article 6.5 of the Organic Law of Court Remedies on Constitutional Rights and Guarantees. So is decided.

However, this Chamber by constitutional mandate urges the Fifth Court of Control of the Criminal Judicial Circuit, State of Vargas, to hold a hearing in the presence of the accused with their respective attorneys and the prosecutor, with the purpose of considering the application of preliminary injunctions replacing the measure involving deprivation of liberty, as provided in Article 244 of the Organic Criminal Procedural Code. Such mandate is not contrary to what has been said in decision No.1712/2001 of 12.09, case: Rita Alcira Coy, Yolanda Castillo Estupiñan and Miriam Ortega Estrada. Even though all measure, coercive or preliminary injunctions, ceases when two (2) years elapse without having held trial and the accused, in principle, are automatically released from the investigated crime. In the present case, illicit traffic of narcotic and psychotropic substances, as a multi offense crime that injures various legal assets, as example: health, life.⁹

To begin with, it is important to stress that both decisions that started the involvement of drug crimes by the Supreme Court of Justice, first the Criminal Court and then the Constitutional Chamber, were perfectly aligned in their argument.

However, this new decision changes the line of argument, establishing a great deal of confusion on the hierarchy of the sources of Venezuelan law, the application of International Law in Venezuela, the nature of the

⁹ Venezuelan official web site for the Supreme Court of Justice <http://tsj.gov.ve/decisiones/scon/Agosto/2398-280803-03-0051>. Accessed in March 2005.

Constitutional Chamber and the monitoring of its criteria by the rest of the courts of the Republic. But in its substance, it confirms that the highest body of the judicial branch in Venezuela considers drug related crimes as crimes against humanity.

Three years later, the Criminal Appellate Chamber of the same court confirmed its standing in a decision dated December 18, 2006. Again, drug related crimes are qualified as crimes against humanity through the argument of the two criteria previously presented in the following manner:

The investigated crimes are related to the traffic and transportation of illicit narcotic and psychotropic substances, so they are pluri offensive because they seriously threaten physical, mental and economic integrity of an unknown number of people. It similarly generates social violence in the areas where such criminal action takes place. In this regard, the Chamber considers such crimes as crimes against humanity, impunity for which should be avoided in agreement with the principles and statements provided in the United Nation Single Convention on Narcotic Drugs (1961); Convention on Psychotropic Substances (1971), and Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988).¹⁰

It is interesting to point out that the decision does not expressly quote the Rome Statute, but in general mixes the will of the international community in rejecting drug trafficking related crimes marking them as crimes against humanity contained within the Statute of Rome. In any case, the argument and the core of the decision were sustained.

2.3. Why drug trafficking related crimes cannot be considered as a crime against humanity

In this paper we have tried to point out some issues that we consider relevant from the perspective of constitutional law, but at the same time we intended to refer to some of the aspects that have to do with International Criminal Law.

In this vein, we consider that highlighting those aspects that contribute to clarifying the definition of crimes against humanity would be useful for everybody.

¹⁰ Decision N° 568 Criminal Appellate Chamber, File N° A06-0370 dated 18/December/2006.

In this regard, drug related crimes are certainly a worldwide scourge that may cause serious harm to the population. But it cannot be considered a crime against humanity, nor can it be subsumed under the competence of the International Criminal Court as part of the most serious and significant crimes, as defined by the international community.

The Statute of Rome described the active subject of Article 7, number 2, as a State or an organization; it is very difficult to fit into the element of crime organizations engaged in drug related business, even though some drug cartels operates in a regional or global scale. Drug trafficking crimes, described in internal laws and international treaties, were approved with the idea of repressing criminal groups or illegal gangs to produce profit. Those are not within the express provisions established by the Rome Statute.

In short, drug trafficking is a multi-dimensional crime that involves the will of the producer, a trader and a consumer. But in no case we may include it, as suggested by the Constitutional Chamber, as a crime against humanity; in particular, since a “buyer” is also involved, who acts with some presumed degree of volition, it cannot simply be construed broadly as a *widespread or systematic attack directed against any civilian population*. *The reality appears to be more complex since a voluntary act of purchase, or the subsequent recreational use of a drug, while potentially harmful, can't really be regarded in the same category as an “attack.”*

Furthermore, the general definition of “other inhuman acts” is not in agreement with the spirit in which the article is based. In particular, it is difficult to locate the passive subject, as explained by Magistrate Judge Angulo Fontiveros, when he referred to the legally protected interest. In the same consequence of drug trafficking crimes, in relation to the drug dependence arising from the regular consumption of prohibited substances, there is the individual's own and personal decision. This own, free and personal decision of each human being, will be then treated by the internal legislator as a disease, but not as a crime.

Therefore, considerations concerning distribution of prohibited substances to the people as part of a systematic attack or that such action is deliberately seeking for the destruction or to cause suffering to the people are simply not aware of the commercial nature of the transactions entail in the drug exchange in the international market. And there is a difference in the actions typified by the Statute and the conducts prosecuted by the national legislator; most importantly, drug related crimes have monetary profits on as a primary motivation. On the contrary, international crimes have a primary political objective.

Thus, we consider that the Supreme Court of Justice of the Bolivarian Republic of Venezuela has erroneously applied the concept of crimes against humanity. Furthermore, this misconception may result in legal situations that may affect the foreign policy of the Government in the future.

The international fight against drugs related crimes has been permanently informed by the segmentation of the problem: 1. Traditional consumers and growers. 2. Drugs related crimes, and 3. Drugs trafficking and money laundering, as a more complex and international stage of the crime.

The reason why international treaties on this matter have built a broad framework of cooperation, allowing each state to adopt the rules that best fit into their national legislation, is because of the complexity and dispersion of the various activities that make up these crimes. In particular, international relations in this regard has been characterized by the conscious avoidance of creating a supranational body endowed with monopoly powers of investigating punishing such crimes. On the other side, it is important to remember that states, unilaterally, may establish accomplishment levels of the cooperation agendas against international crime.

This diversity and complexity has special aspects in the Americas because the Andean countries are considered among the main producers of drugs in the world. This production of narcotic drugs is closely related to aspects of internal order, ranging from ancestral practices of indigenous peoples concerning the uses of these prohibited or limited substances, but also involves the free use in some countries as is the case of the coca leaf in Bolivia or Peru.

In sharp contrast, the various situations that have been arising in Colombia with the different stages of drug trafficking, ranging from terrorism related with drugs in the eighties and nineties with infamous characters such as Pablo Escobar Gaviria or, more recently, the participation of former revolutionary groups like the Fuerzas Armadas Revolucionarias de Colombia (FARC) in growing and distributing the prohibited substances to use the resources arising from its trade in financing the armed conflict. Similarly, in Mexico groups that control drug distribution are developing a

wide display of operations that made US Secretary of State, Hilary Clinton, compare the country with the Colombia of the eighties.¹¹

All these circumstances that we have briefly addressed are part of the sovereignty of each country and the way that each society faces its problems. However, the qualification as a crime against humanity of these national crimes could provide a basis for an international action in the solution of internal problems. So, defining the international drug trade as an internal “crime against humanity” could lead to much misunderstanding and tension; such a construction could easily lead to more contentious international relations. Hence, there is a very real danger in this regard of creating more problems than solutions.

Some conclusions

Local interpretation of international criminal law is becoming a new phenomenon in the judicial field around the globe. The case log of courts everywhere feature environmental issues, economic negotiations and contested human rights. In some cases, local interpretation is positive if the objectives achieved are related to the punishment of criminals or avoiding impunity. In other cases, that interpretation could be new and help to open a new path for the law, as it happened with the Colombian¹² interpretation of political genocide. This has created confrontations among specialists, because it opens the criminal definition of the Convention for Prevention and Punishment of the Crime of Genocide of 1948.

In the case of crimes against humanity, defined first in the Nuremberg Charter, it represents a significant advance of public international law; it defines intolerable actions and attacks, aimed at civilian populations, in order to create a judicial category and ensuing national or international jurisdiction. By doing so, this historic innovation helps to prevent more serious behaviors that affect the international communities, guaranteeing punishment and preventing its repetition.

The International Criminal Court has been established to try those crimes whose customary consensus among the international community does not leave doubts about the need for their eradication and prosecution. These crimes are: genocide, war crimes, crime of aggression and a broader category such as crimes against humanity.

¹¹ <http://www.queenslatino.com/mexico-esta-como-colombia-hillary-clinton/> Accessed in July 2012.

¹² Decision of the Colombian Constitutional Court No. C-177 of 2001

These crimes against humanity, namely infringing on the core values of civilization and that may endanger international peace, according to the first paragraph of Article 7 of the Statute of Rome: Murder, extermination, enslavement, deportation or forced transfers, Incarceration in Violation of the fundamental Rules of International Law, Torture, Rape, Political Persecution, Racial, National, Ethnic, Cultural, Religious, Disappearance Crime, the Crime of Apartheid and other similar acts.

The international community has not reached a consensus to include drug-related crimes in the list of crimes against humanity.

It has been argued here that the decision of the Supreme Court of the Bolivarian Republic of Venezuela, considering drug-related crime as a crime against humanity does not fit the conceptual definition of that crime or even further the useful evolution of customary international law and existing treaties in the field. Finally, it could open a gateway to the intervention of international courts, on issues like drugs that have not been solved within national societies, let alone within the international community as a whole.

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**HUMAN RIGHTS AND MULTILATERAL TRADE:
A PRAGMATIC APPROACH TO UNDERSTANDING THE
LINKAGES**

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A. INTRODUCTION:

The modern recognition of international human rights largely emerged, as Prof. Boudreau stated earlier, out of the agony and ashes of World War II. The linkages between human rights and multilateral trade have been a subject of considerable debate in the last decade or so. The emergence of the World Trade Organization (WTO) in 1995 as the nodal agency for multilateral trade in goods and services led to its intrusion into many issues that were not until then considered to be normally in the domain of trade policy¹. These included areas such as intellectual property rights and sanitary and phyto-sanitary measures. This intrusion has over the last few years brought to limelight various tensions caused by overlapping international obligations of States under different legal regimes and international fora. Human rights, in particular, merit special concern, inasmuch as, States have undertaken through numerous international treaties under the auspices of the United Nations (UN), to respect, protect and fulfill human rights. The International Covenant on Economic, Social and Cultural Rights (ICESCR), in particular, requires states to pursue policies and strategies aimed at the realization, for every individual of the right to food, health, shelter, education, work, and social security.

In the face of these human rights obligations, it is imperative that International Trade policies must be framed in a manner that would, at the very least, not be in violation of the former and, in fact, would further them. All members of the WTO have ratified at least one core international human rights treaty.² States, thus, face the dual task of not only adhering to their commitments under both sets of law, but also harmonizing the same so as to avoid breach of one by the other.

International trade policies adopted by States under the WTO have, however, raised serious human rights concerns, with scholars from the civil

¹ Sampson, Gary (2005) – *The WTO and Sustainable Development*, P. 4, UNU Press, Tokyo

² Dine, J and Fagan, A (2006) – *Human Rights and Capitalism*, P. 228, Edward Elgar Publishing, Cheltenham, UK.

society³ as well as at least one early report of the UN⁴ itself branding the WTO as a ‘veritable nightmare’ for human rights of citizens in the third world. The backlash against economic globalization has at its heart the adverse effects that opening up of markets, along with the trade policies of dumping, subsidizing and distorting liberalized trade, mete out to the third world countries. Even so, the adoption of a ‘human rights clause’ in the WTO Agreements has been met with severe resistance from the developing countries themselves, primarily because they see its incorporation as a proxy for inflicting neo-colonialist policies on them and an underhand means by which the Developed Countries would impose trade barriers.⁵

The purpose of this paper is to provide a pragmatic perspective to the linkages between human rights and multilateral trade. There are two primary reasons why the approach presented in this paper has been self-labeled as the ‘Pragmatic Approach’. Firstly, the starting point for this approach is based on a complete bypassing of the oft cited argument by critics that liberalized trade in general has not led to or cannot lead to economic growth and is, therefore, resultantly bad for human rights. Undoubtedly, some critics of the liberalized trade system have cast doubts over its efficacy in bringing about economic growth;⁶ however, the fact of the matter is that opening up of markets is now an irreversible process inasmuch as states are legally bound by WTO agreements for a substantial amount of multilateral trade (indeed, the proliferation of Preferential Trade Agreements has only fortified this proposition). States have invested way too much, both structurally and economically, in transitioning to the liberalized trade regime to permit any retraction now. Whether skeptics like it or not, for good or for bad, protectionism is a bygone option, unless specifically permitted by the WTO Agreements in exceptional circumstances. Pragmatism, therefore, demands that the multilateral trade-human rights linkages be discussed bearing that in mind.

The second reason is concerned more with the approach to finding solutions to the problems related to linkages. The criticisms of WTO

³ Tandon, Yash (1999) *The World Trade Organization and Africa's Marginalization*, Australian Journal of International Affairs, vol. 53, No. 1 (1999), P. 83-94.

⁴ United Nations: Economic and Social Council (2000)- The Realization of Economic, Social and Cultural Rights: Globalization and its impact on full achievement of human rights, E/CN.4/Sub.2/2000/13, Para 15

⁵ Kolben, Kevin (2006) – *The New Politics of Linkage: India's Opposition to the Worker's Rights Clause*, Indiana Journal of Global Legal Studies (2006), P. 225-259

⁶ Joel R. Paul (2003), *Do International Trade Institutions Contribute to Economic Growth and Development?*, 44 Virginia Journal on International Law (2003-2004), Pp. 283-340.

policies vis-à-vis human rights have been so severe that critiques have tended to brand the WTO itself as being antagonistic to human rights.⁷ Proposed solutions have, therefore, varied from a complete abolition of the WTO itself,⁸ to entirely overhauling the WTO processes by making human rights a central purpose of the same.⁹ The fallacy with most of these arguments lies in the fact that human rights, although indeed affected by international trade policies, are so affected in many and varied ways. Some of them are directly a result of inadequacies in the WTO policies, and therefore, warrant a human rights-based approach. But there are also some human rights which, despite the fact that they succumb during the process of opening up of markets, are not directly caused by WTO obligations of States. As such, they deserve to be addressed in a different manner. A holistic all-inclusive approach to problems which are inherently distinct by their very nature cannot be the solution. The WTO is primarily a trade institution and there is no merit in attempting to convert it into a human rights institution, especially in light of the fact that the UN is the specialized international institution bearing responsibility to promote human rights on the global level. The need, however, is to find approaches that ensure that WTO processes do not adversely affect existing legal obligations to recognize and enforce human rights.

In this factual matrix, effective solutions need to be provided and responsibility clearly fixed on States, the UN and the WTO system to jointly and separately take action and to make them accountable for addressing human rights concerns without venturing into beggar-thy-neighbour policies that protectionism entails. This paper would, therefore, attempt to deconstruct the broad ways in which multilateral trade under the WTO affects human rights and would then examine the pragmatic approaches through which both sets of obligations can be harmonized without disturbing the fundamental ethos underpinning both the WTO and the UN. The stress would be on approaches rather than on specific solutions.

⁷ Op. Cit. FN 4

⁸ Freedom Socialist Party & Radical Women (1999): *Abolish the WTO: Capitalist trade can never be free or fair*, <http://www.class.uidaho.edu/gjmarchive/pdf/Images%20to%20upload/WTO%2099/wto20/wtop113099f.pdf> (Retrieved on 14/08/2012)

⁹ 3D_Trade - Human Rights - Equitable Economy - Dommen, Caroline (2004): *The WTO, International Trade and Human Rights*, available at http://www.3dthree.org/pdf_3D/WTOmainstreamingHR.pdf (retrieved on 14/08/2012)

B. THE APPROACHES OF THE UN AND THE WTO

The ‘scourge of war’ evidenced by the world, both during and in the immediate aftermath of World War II, witnessed the prelude to a ‘New World Order’, according to which, the new post-war international order was to rest on four pillars - peace and human rights on the one hand, and trade and finance on the other.¹⁰ The first two pillars of peace and human rights were conceived to be developed and implemented by a global inter-governmental institution to be known as the United Nations. In order to develop and implement the other two pillars of trade and finance, the two Breton Woods Institutions, namely, the International Monetary Fund and the World Bank, as well as the de-facto predecessor of the WTO – The General Agreement on Tariffs and Trade, 1947 (GATT 1947), were established by the participants of the Breton Woods Conference of 1944.¹¹

Before focusing upon the complex interactions between the obligations of States under the UN and the WTO, it would only be apt at this juncture to briefly highlight two essential facts, one historical and the other legal, a proper understanding of which is a *sine qua non* for an intelligible appreciation of this topic.

The first issue concerns the historically different approaches adopted by the UN and the WTO in their functioning - the human rights centric approach of the UN and the economic approach of the WTO - despite both organizations having some shared common objectives. The UN since its inception has incorporated, not only in the UN Charter and other Human Rights Treaties, but also in the functioning of its various subsidiary organs,¹² a human rights centric approach. On the other hand, the WTO, like its predecessor, the GATT 1947, has followed a predominantly economic approach based on the theory of liberalization of trade, as would be evident from the Preamble of the WTO Umbrella Agreement.¹³

¹⁰ Possel, Jens (2008): ‘A Human Rights approach to ‘sustainable development’ within WTO’, in *Developing Countries and the WTO*, Edited by Sampson, G and Chambers, B, Pp. 192-228 at P.192, UNU Press, Tokyo.

¹¹ Idem

¹² For instance, see the founding documents of FAO, WHO, UNICEF, UNCTAD, UNHCR etc.

¹³ Petersmann, Ernst-Ulrich (2008) – ‘The development objectives of the WTO: State-centred versus human rights approaches’, in *Developing Countries and the WTO*, Edited by Sampson, G and Chambers, B, Pp 169, UNU Press, Tokyo.

This difference in approaches of these two institutions since their inception gives us a very good indication of why the two legal regimes of trade and human rights have developed more or less independently from one another, as against an interdependent and integrated system. This dichotomized development has resulted in a rather ambivalent situation for States since they are legally bound to both the regimes. At the UN, States adopt (or at least are required to adopt) a human rights based approach in compliance with their human rights obligations under the UN Charter and various human rights agreements. In the same breath, under the auspices of the WTO, these very States adopt a predominantly economic approach in order to promote their own economic growth. The ambivalence in approaches results in a problem only when either set of obligations lead to undermining the obligations cast under the other. In other words, if certain policies adopted by States under the WTO result in undermining human rights, then these States are actually breaching their human rights commitments in favour of their trade commitments.

However, what must be stressed is that despite the distinct approaches adopted by States at the two organizations, both, in fact, share some common objectives. Article 55(a) of the UN Charter provides that the United Nations shall promote higher standards of living, full employment, and conditions of economic and social progress and development. These are the very same expressions that are present in the Preamble of the WTO Umbrella Agreement, which reads as follows:

The Parties to this Agreement,

Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,...

Agree as Follows:

This only emphasizes the fact that although these organizations were established separately with specialized mandates, it was never the intention that they develop in such remarkable isolation from each other. To the

contrary, what was sought to be obtained was a unified international social order based on respect for human rights, sovereign equality of states and international cooperation in trade and finance.

There are good reasons why these two regimes ought to have developed in a mutually reinforcing manner. The fields of human rights and trade are inter-dependent and in many cases overlapping. The fulfillment of human rights, including both civil and political on the one hand, and economic, social and cultural on the other, depends on generation of wealth and availability of resources, which result from trade. For instance, exercise of right to vote, effective functioning of judiciaries, the right to food, clothing and shelter, the right to health, all need necessary resources and are thus, dependent in part on successful implementation of trade policies. Similarly, a healthy population with necessary basic amenities, medicines, access to justice and effective governance are all pre-requisites of a successful multilateral trading regime. What is apparent is that one cannot exist without the other, especially in the context of today's globalized world.

The second issue that warrants clarity is the legal debate on *interpretation* of WTO rules vis-à-vis human rights treaties. The Vienna Convention on the Law of Treaties, especially Art.31(3)(c) thereof, recognizes the rule of 'Harmonious Construction' of international laws or the rule of 'Systemic Integration'¹⁴. Quite logically, the interpretative principle of Harmonious Construction means that WTO rules must not be interpreted in a manner that human rights obligations under UN Treaties would be infringed. What is important to remember, though, is that the principle does not mean that human rights provisions should be used to supplement or add a human rights obligation to an existing WTO provision. Also, human rights provisions cannot be used to diminish the operation of provisions under the WTO.¹⁵ In other words, even if it is found that certain human rights are breached because of the *omissions* in WTO agreements, the agreements cannot be added or diminished with human rights obligations under UN Treaties by way of interpretation. This fact is significant because it will be

¹⁴ United Nations: International Law Commission (2006), *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, available at http://untreaty.un.org/ilc/guide/1_9.htm (retrieved on 14/08/2012)

¹⁵ Marceau, Gabrielle (2006), 'WTO Dispute Settlement and Human Rights', in *International Trade and Human Rights*, Edited by Abbott, F et. al., at P.215, University of Michigan Press, USA. This prohibition of 'filling in the gaps' in a provision of law by reading in extraneous requirements, flows from the doctrine of *casus omissus*. See Art.3(2) of the Dispute Settlement Understanding for the interpretative limits on the DSB.

argued in the latter part of this paper that WTO rules generally do not *per se* violate human rights laws. WTO laws, to a large extent, do limit the policy space that States have in order to ensure human rights at home, but that lack of policy space cannot be expanded by recourse to rules of interpretation of treaties. The solution lies elsewhere.

There is another preliminary legal issue that warrants attention. Article 103 of the UN Charter explicitly states that “in the event of a conflict between the obligations of the members of the UN under the Charter and their obligations under any other international agreement, their obligations under the UN Charter shall prevail”. Now, Art. 55(3) of the Charter lays down that the UN shall promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” Art. 56 is a pledge by all member States that they will “take joint and separate action in co-operation with the organization for the achievement of the purposes” set forth in the Art. 55. As a result, it has been argued that by virtue of Article 103, the human rights obligations of States as enshrined in Articles 55 (3) and 56 of the UN Charter, enjoy a hierarchical superiority over the obligations of the same States under any other treaty law¹⁶, including WTO law. What follows as a natural corollary from this argument is that in the contingency of a WTO obligation not being capable of being interpreted in a manner consistent with a human rights obligation, the former must be superseded by the latter because of the latter’s hierarchical superiority in the normativity of international law.¹⁷

However, this argument is fraught with dispute. Marceau, for instance, argues that this is a rather expansive interpretation of the aforesaid Charter provisions. According to her, under International Law, only a few human rights are recognized as acquiring the status of ‘peremptory norms of international law’ (*jus cogens*), providing them with hierarchical superiority over WTO provisions in cases of conflict. Thus, to say that all human rights including those not enjoying a *jus cogens* status have automatic and unbounded legal primacy over WTO agreements cannot be the correct interpretation of these provisions.¹⁸

Her arguments do have some merit. Implicit in the argument she rebuts, is a proposition that generally in the normative hierarchy of international law,

¹⁶ Loukaidēs, Loukēs G. (1995) – *Essays on the Developing Law of Human Rights*, Chapter 10, at P.220, Martinus Nijhoff Publishers, Dordrecht, Netherlands.

¹⁷ Federation of International Human Rights (2005), *Understanding Global Trade and Human Rights*, at P.1, available at <http://www.un-ngls.org/orf/FIDH.pdf> (retrieved on 14/08/2012)

¹⁸ Op. Cit. FN 15

human rights laws stand at a higher pedestal than international trade laws. As stated above and at the risk of necessary repetition, the reason for this proposition is that apparently, human rights obligations are UN Charter Obligations and WTO obligations are not, and therefore, Art.103 settles the issue in favour of the former.

This proposition is, however, not quite accurate. It is indeed possible to trace WTO obligations of States also (i.e. those under the WTO Umbrella Agreement) to the UN Charter itself. As stated hereinabove, Art.56 of the UN Charter says that all Members pledge themselves to take joint and separate action in co-operation with the UN for the achievement of the purposes set forth in Article 55. The pledge by States contained in Art.56 governs the objectives enshrined not only in Art.55 (3), but in Art.55 (1) as well. It would surely be a valid argument to make that the objectives of WTO as enshrined in the Preamble of its Umbrella Agreement, as well as the foundational economic logic underlying the theory of trade liberalization, is to achieve and promote higher standards of living, full employment, and conditions of economic and social progress and development, as is required by Art.55 (1) of the Charter. If that be correct, then what follows is that States under the WTO are actually seeking to fulfill their UN Charter obligations under Art.55(1), which are equally binding as obligations under Art.55(3). In that case, there is no question of human rights obligations under Art.55(3) being hierarchically superior to the obligations of States under Art.55(1). Reliance on Art.103 to confer supremacy to human rights obligations over WTO obligations is then somewhat simplistic in view of the Charter's own corollary purposes to enhance the well-being of the human person..

In any case, even if we assume that there exists a legal primacy of human rights obligations, it would be very important to point out what that entails. Art. 103 would supersede *obligations existing* under WTO Agreements with human rights obligations under UN Charter. If however, it can be shown that human rights obligations are undermined as a result of *absence of obligations* under WTO Rules, Art. 103 may not have application at all. This is indeed the case, as there is no obligation existing in any WTO agreement that requires States to violate human rights. Indeed, as we shall see, several WTO laws do create environments that limit the policy space that States have to adequately address their human rights concerns; but that is somewhat different from arguing that WTO obligations of States are in conflict with their human rights obligations.

Yet, this does not mean that WTO rules and policies can violate human rights. To wit, WTO obligations surely cannot undermine human rights obligations of States, but not because of a presumed hierarchical superiority of the latter under Art. 103. They cannot do so, also because States have undertaken both sets of obligations under two different institutions and obviously, therefore, cannot operate at either one in a manner that they undermine the other.

With this backdrop, let us now analyse the different manners in which human rights are affected while interacting with the process of trade liberalization under the WTO.

C. DECONSTRUCTING MULTILATERAL TRADE-HUMAN RIGHTS LINKAGES

Although there now exists a widespread concern and recognition amongst different actors about the adverse effects of trade policies on human rights, there is no general consensus on how the human rights issues related with trade must be addressed. While some argue that the WTO being primarily a trade organization should not be overburdened with the additional task of handling human rights,¹⁹ others argue that the WTO has not only moral but legal responsibility to make policies that protect human rights and also promote the same.²⁰ This difference of opinion has also manifested itself in the various solutions proposed to tackle the issue. One of the solutions proposed is strengthening the UN human rights monitoring bodies,²¹ which do not enjoy the same judicial authority that WTO Dispute Settlement Bodies enjoy. Other solutions include developing a human rights based approach to the WTO,²² which involves the whole gamut of proposed reforms, ranging from incorporation of a ‘social clause’ in the WTO

¹⁹ Eres, Tatjana (2004) - *The limits of GATT Article XX: a back door for human rights?*, Georgetown Journal of International Law, Vol.35, No. 3. Also See Op.Cit. FN 1

²⁰ Howse, Robert and Mutua, Makau (2000): *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization*, International Centre for Human Rights and Democratic Development, available at http://www.dd-rd.ca/site/_PDF/publications/globalization/wto/protecting_human_rightsWTO.pdf, (retrieved on 14/08/2012)

²¹ Zagel, Gudrun (2005) – *WTO and Human Rights: Examining Linkages and Suggesting Convergence*, International Law Development Organization (IDLO), IDLO Voices of Development Jurists Paper Series, Vol.2, No.2, 2005, at P.20

²² Robinson, Mary (2000) – ‘Making the Global Economy Work for Human Rights’, in *The Role of the World Trade Organization in Global Governance*, Edited by Sampson, Gary, Chapter 10, Pp209-222 at P. 218, UNU Press, Tokyo. See Also Op.Cit. FN 10.

Agreements,²³ to changing the objectives of the WTO itself by making human beings the central subject of international trade rather than mere objects,²⁴ to conducting human rights impact assessments of trade policies,²⁵ to changing the judicial approach of the Dispute Settlement Mechanism²⁶. However, in almost all the proposed solutions, there appears to be a collective dealing of all human rights issues affected by trade, in that, the various facets of human rights being undermined by trade have been treated as a single issue which deserve a common solution. The truth is very much to the contrary. International Trade affects human rights in various ways, directly and indirectly, and no single one-size-fits-all formula can be devised to take care of all the different ways in which WTO policies affect human rights. This calls for a pragmatic deconstruction of these different linkages and this deconstruction, in turn, needs a rational basis for doing so.

Some of the most visible examples of human rights concerns arising out of multilateral trade comprise issues such as lack of access to medicines, subsidies granted in one part of the world affecting livelihoods of producers in another part of the world, trade in products that affect health, labour standards not being adhered to in order to benefit from comparative advantage, amongst others. When it comes to human rights of the citizens of a State, the principal international legal obligation to respect, protect and fulfill those, lies on the State concerned. Therefore, it is obvious, that States need to have adequate 'space' to adopt and implement appropriate 'policies' for respecting, protecting and fulfilling human rights. Their ability to do so can be seriously jeopardized if this 'policy space' is limited due to external

²³ Sterling, Patricia (1996) – The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the WTO, 11 American University Journal of Law and Policy P.1; Sutherland, Johanna (1998) – International Trade and the GATT/WTO Social Clause: Broadening the Debate, 14 Queensland University of Technology Law Journal 1998, P.83.

²⁴ Op.Cit FN 13

²⁵ United Nations: *Economic, Social and Cultural Rights: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, Report of the Special Rapporteur Paul Hunt, Addendum: Mission to the World Trade Organization, 1 March 2004, E/EC.4/2004/49/Add.1, para. 53.

²⁶ Petersmann, Ernst Ulrich (2008) - *Human Rights, International Economic Law and Constitutional Justice*, 19 EJIL (2008) 769. In this article, Petersmann argues that the human rights revolution imports into WTO dispute settlement a conception of constitutional judicial review. For a critique of Petersmann, see Howse, Robert (2008) - *Human Rights, International Economic Law and Constitutional Justice: A Reply*, EJIL 19(5) :945-953. Also see Irish, Maureen (2011), *Special and Differential Treatment, Trade and Sustainable Development*, The Law and Development Review, Vol.4, No.2, Article5, arguing for adoption of a teleological approach by the DSB.

factors, including multilateral trade rules. Because WTO laws are legally binding on all States and because the WTO has a comparatively more robust dispute settlement mechanism than other regimes in international law, they can also shape the limits of the policy space that States have in adopting appropriate domestic laws for promoting human rights. In some instances, WTO laws indeed do limit this policy space whereby they create a limiting environment for States to take protectionist trade measures to safeguard human rights. Examples include WTO laws on subsidies, access to medicines, trade in products that may affect health, amongst others. The solution for these problems obviously lies in amending WTO laws and processes that limit policy space of States to fulfill their human rights obligations.

On the other hand, there are some instances where WTO laws do not necessarily limit policy space of States to fulfill their human rights obligations. Instead, States do so voluntarily in order to take maximum advantage of the liberalized trading system. Examples include lax labour standards adopted by several States in order to benefit from cheap labour and thereby gain comparative advantage on the global market. In this instance, the WTO laws do not create any sort of limiting environment for States to safeguard labour rights of their workers. To the contrary, they create the permissive environment for States to be able to violate labour rights. It is obvious that solutions for problems created by those WTO laws that limit policy space of States and those that do not, cannot be one and the same and there is a need to deconstruct these linkages. On the basis of this framework, we may categorize the linkages between multilateral trade and human rights under two broad heads.

1. Trade Laws that do not limit policy space of States with respect to their human rights obligations:

This category deals with those human rights which are not directly affected by actions of States in *compliance* of their WTO obligations, but are willingly or unwillingly neglected in the process of liberalization and in order to benefit from comparative advantage. In other words, these are cases where in order to address human rights concerns, WTO Agreements need not be amended, tampered with or even revised. As stated above, in this instance, WTO laws do not limit policy space of States to deal with the particular human rights issue at all. This category predominantly includes labour rights, along with all other contextually associated human rights such as gender and child rights.

Many Developing States undermine core labour standards set under the International Labour Organization and other human rights treaties (including working conditions, minimum wages, right to unionize, equal remuneration, prohibition of child labour, gender equality etc.) in order to gain comparative advantage of their products on the world market. For these countries, low wage labour and unrigid working standards constitute their comparative advantage on the global scale since they result in a higher turnover of products and services at lower costs than those prevalent in developed countries. As a result, the incentive for maintaining the status quo with relation to these human rights violations is much more than the obligations under various human rights treaties related to labour standards. In the process, labour rights of actors within developing countries are severely and adversely affected.

Two reasons can be ascribed for this situation within the WTO context. Firstly, the existing provisions of WTO agreements do not create any obligations on member states to abide by their labour rights commitments under the ILO Conventions and other treaties. To the contrary, in the specific instance of labour rights, WTO rules indirectly prohibit any distinctions being made on products manufactured without labour rights abuses and those manufactured by violating labour rights standards. For instance, the principle of Most Favoured Nation Treatment enshrined under Article I of the GATT, means that member States cannot discriminate between trading partners while imposing import tariffs, for any reasons whatsoever, including on grounds of labour rights abuses in the exporting country, if the products are 'like'.

According to GATT jurisprudence, the likeness of a product is determined through the quality, function and end-use of the product, tariff classification and consumer habits and preferences.²⁷ As the Process and Production Methods (PPM's) do not usually influence the quality of the product and the other aforesaid criteria, a different treatment due to PPM's is not allowed, if the quality of a product is the same.²⁸ In the *Tuna Dolphin II case*, a differentiation between tuna which was caught with dolphin extruding

²⁷ World Trade Organization, Dispute Settlement Body: *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, (L/6216 - 34S/83), GATT Panel Report, 10 November 1987, para. 5.6; Also see *European Communities – Measures Affecting the Prohibition of Asbestos and Asbestos Products* (WT/DS135), Appellate Body Report, adopted on 5 April 2001, Para 101

²⁸ Op. Cit FN 21, at P. 14

devices and tuna which was caught without protecting dolphins, was prohibited, as there was no difference in the ‘likeness’ of the products based on the aforesaid criteria.²⁹ Arguably, a similar situation occurs concerning labour rights issues such as minimum wages or forced overtime work. There is actually no precedence in WTO jurisprudence directly with respect to whether products manufactured by labour rights violations are ‘like’ those manufactured without. However, based on the existing jurisprudence on defining ‘like products’, we can safely come to similar conclusions. Since the quality, function, end-use, tariff classification etc. of products manufactured by violating labour rights are generally the same as those produced without violating them, a State cannot prohibit the import of such products through an import ban or an additional tax as it would violate Art. III or XI of GATT.

Furthermore, Art.XX of GATT allows a state to take certain measures to protect some non-economic concerns such as human, plant or animal life, but only if these protections are required to be put in place within their jurisdiction. There are similar analogous provisions in other WTO Agreements as well, and they are dealt with later in this paper. As a rule, WTO jurisprudence does not allow protectionist measures to be taken by a State as a response to human rights violations in another country. The first US – Tuna case explicitly rejected measures with extraterritorial effects imposed by US to protect dolphins outside their jurisdiction.³⁰ In the *Shrimp-Turtle case*, the import ban imposed by US on shrimps from other countries that were netted without turtle extruding devices was held valid by the Appellate Body on the ground that sea turtles are migratory species and are found in territories where the US has jurisdiction.³¹ This restriction on extra-territoriality principally seeks to address the concerns of the developing countries, that developed countries might start imposing their own unilateral standards as a proxy for protectionism.³² Apart from this fear of neo-colonialism, there are sound policy reasons why extra-territoriality should be excluded from Art.XX of GATT and the analogous provisions in other WTO agreements. This has to do with the stability of the multilateral

²⁹ GATT 1947: *United States - Restrictions on Imports of Tuna* (DS29/R), GATT Panel Report, circulated on 16 June 1994, para. 5.9

³⁰ GATT 1947: *United States - Restrictions on Imports of Tuna* (DS21/R - 39S/155), GATT Panel Report, circulated on 3 September 1991 (not adopted), paras. 5.25

³¹ World Trade Organization, Dispute Settlement Body: *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58), Panel Report, circulated on 15 May 1998, paras 133, 164. However, it did not fulfill the criteria of the chapeau of Art. XX, as the conservation measure was again too restrictive.

³² Op.Cit. FN 21, at P.16

trading system itself. If exceptional protectionist measures based on extra-territoriality are allowed, there is a grave danger of the system sliding down a slippery slope which we may term as ‘extra-extra territoriality’. For instance, if an import ban by the US on products from China is allowed because companies in China are violating labour rights, this is an instance of extra-territoriality. This is because the measure is imposed by the US, not to protect rights of US citizens in the US, but to protect rights of Chinese workers in China. If this were permitted, what stops China from imposing an import ban on US products, because US companies may be violating labour rights neither of US citizens in the US nor of Chinese citizens in China, but of Ecuadorian citizens in Ecuador where such companies may be operating? This is not an instance of extra-territoriality, but of extra-extra territoriality, a portentous slippery slope that will only lead to an utterly dysfunctional multilateral trading system where every State can impose import bans on products from virtually every other country for proxy reasons.

What follows is that together, the concept of ‘like products’ and the prohibition on trade related human rights measures with extraterritorial effects, have resulted in some labour rights issues in developing countries being ignored by such countries.

There is a second reason why WTO laws do not incorporate a specific ‘social clause’ or ‘labour clause’ that may allow States to impose import bans on those States that allow labour rights violations. This reason - and indeed a very potent one - is the vehement opposition by Developing States themselves to the incorporation of such clauses in the WTO Agreements, which would make it incumbent upon members to adhere to strict labour rights standards in the course of their multilateral trade. First is the fear of neo-colonialism, which we have talked about earlier. Secondly, developing countries argue that better working conditions and improved labour rights arise through economic growth — sanctions imposed against countries with lower labour standards would merely perpetuate poverty and delay improvements in workplace standards.³³ Moreover, experience has shown that trade-related human rights measures aimed at changing human rights policies often do not have their intended effect and, on the contrary,

³³ World Trade Organization: *The WTO, Misinformation*, available at http://www.wto.org/english/thewto_e/minist_e/min99_e/english/misinf_e/03lab_e.htm (retrieved on 14/08/2012)

aggravate the situation.³⁴ History has proven that the imposition of certain human rights and social standards from the outside has almost always been a failure, and those that suffer the most due to such external sanctions are the victims of such abuses themselves.³⁵

In this backdrop, it is evident that a stalemate of sorts exists with relation to addressing the labour rights abuses permitted by States, indirectly as a result of participation in the process of trade liberalization under the WTO. The crucial question, therefore, is how should the international community approach this problem? Should the WTO bear the brunt of addressing the human rights abuses under this category?

In searching for an answer to this question, it must be borne in mind that the abuses under this category are not a direct result of member states complying with their WTO obligations. The WTO rules nowhere require States to be lax on labour standards for their own workers. In other words, WTO laws do not create a limitation on the policy space that States have in enhancing labour standards domestically. There is, therefore, no real conflict between WTO laws and human rights laws in this category of linkages.

This is precisely what makes this category so distinct from the second category that will be discussed below. Violations of labour and associated rights, unlike other linkages, are *not* caused due to provisions of WTO Agreements. They are caused because States do not follow their human rights and ILO obligations and breach them. In other words, there is no need to amend GATT or GATS to make it illegal for States to violate labour rights. These obligations already exist under labour rights instruments and must be followed in any case. When advocates talk about countering these violations of labour rights by inclusion of 'labour clause' in WTO Agreements, they are really seeking creation of enforcement mechanisms for labour rights through the WTO, an organization created for a completely different purpose, and not through the body that was created to deal with the issue of labour rights – the International Labour Organization. It is true that the provisions of GATT or GATS do not make products manufactured through violations of labour rights illegal. But that not make the violation of labour rights under ILO instruments legal. They

³⁴ Bal, Salman (2001), *International Free Trade Agreements and Human Rights: Reinterpreting Art. XX of the GATT*, 10 Minnesota Journal of Global Trade, pp. 62 - 108, at P. 64.

³⁵ Stern, R.M. and Terrell, K. (2003) - *Labor Standards and the World Trade Organization*, at P. 8, available at <http://www.fordschool.umich.edu/rsie/workingpapers/Papers476-500/r499.pdf> (retrieved on 14/08/2012)

are illegal anyway. Just by making them illegal under the WTO will not make the violations *more* illegal. As such, WTO Agreements do not really need to be amended to hold States accountable for violation of labour rights.

It is apparent that not much can be achieved by thrusting additional responsibility on the WTO to address this category of human rights abuses. WTO clearly does not have the mandate, resources or expertise to follow up on these issues. This job can be best done by the International Labour Organization itself, and must not be transferred to the WTO. For instance, nothing prevents the UN agencies, including the ILO, from asking States to enforce the labour standards set by various treaties, while conducting trade as per WTO rules. In fact, it is their job to do so. As Zagel puts it, “if the human rights community wanted the enforcement of standards through trade restrictions, this would have been established through the existing human rights instruments, not in an entirely different organization - whose task is to promote free trade”.³⁶ The UN and its specialized agencies are charged with advancing human rights, and a case can be made that these institutions should be strengthened and given the resources they need to carry out their tasks successfully, so that the WTO does not have to deal with the wider agenda that it now seems to be acquiring.³⁷ Unfortunately, many of the relevant UN treaty bodies (viz. Committee on Economic, Social and Cultural Rights, Human Rights Committee etc.) as well as the Charter bodies (the Human Rights Council etc.) do not have the enforcement mechanisms necessary to effectively hold State actors to their obligations.³⁸ As such, the approach for this category should really be to strengthen the UN human rights system and the ILO mechanisms, and not additionally burden the WTO.

Referring back to the theme of pragmatism emphasized in this paper, the approach urged above is also necessary, because amending GATT Art.XX to incorporate a new ‘labour clause’ is an extremely complex process. Art.X of the Agreement Establishing the WTO requires a consensus to be built within the Ministerial Conference, or in its absence, a two-thirds majority, for even tabling the amendment proposal for consideration of the Members. It is highly unlikely that a proposal for amending Art. XX or analogous WTO provisions to include a ‘labour clause’ would find a two-thirds majority at the WTO under the prevailing circumstances. Given the

³⁶ Op. Cit. FN 21, P. 20

³⁷ Op. Cit FN 1, at P. 11

³⁸ International Federation for Human Rights (2005), *Understanding Global Trade and Human Rights*, Report No. 432/2, available at www.fidh.org/IMG/pdf/wto423a.pdf, at P. 8,9 (retrieved on 14/08/2012)

stands adopted by various States, the possibility of such incorporation is practically nil. It would in fact be more pragmatic to advocate for amending the ILO Constitution in accordance with Art.36 thereof, in order to put in place strong enforcement and supervisory mechanisms. Advocacy strategists must realize that it is a significantly easier process to amend the ILO Constitution than amending a WTO Agreement.

2. Trade Laws that directly limit policy space of States with respect to their human rights obligations:

This category deals with those human rights violations which result directly from the inadequacies in WTO Agreements and corresponding trade policies adopted by members of the WTO. These cases result in limiting the policy space that States have in order to attend to their human rights obligations. This issue is connected intrinsically with the process of liberalization itself, inasmuch as, opening up markets in terms of specific WTO Agreements, entails major structural changes within a society, which in turn ensues in human rights implications. Although structural changes of this kind will inevitably occur within any economy in its normal course of evolution, globalization tends to have both an accentuating and a distorting effect on structural changes.³⁹ Because WTO agreements necessitate these structural changes, it is imperative that these agreements must be framed in a manner compatible with human rights.

It has become commonplace for critics to argue that existing WTO rules contravene human rights. But a closer scrutiny would suggest that it is not the WTO rules *per se*, but the *inadequacies* in them that lead to human rights being violated. If trade laws limit policy spaces of States to adequately deal with human rights concerns at home, that is because the existing WTO laws create that limiting environment for States, not because WTO provisions are directly contrary to human rights law. Let us test this with three illustrations, which by no means are exhaustive, but are useful to highlight the distinction between the misplaced argument that WTO rules violate human rights and the correct position that the inadequacies in WTO rules result in limiting policy spaces of States to adequately deal with their human rights obligations.

³⁹ United Nations, Economic and Social Council (2004), *Study on Policies for Development in a Globalizing World: What can the Human Rights Approach Contribute*, E/CN.4/Sub.2/2004/18 of 7 June 2004

The first example is the harmful effect of the inadequate WTO policies enshrined under the Dispute Settlement Understanding (DSU) relating to economic compensations. This example is borrowed from Magda's work,⁴⁰ albeit in a different context and to raise a different argument. Cotton is a strategic crop for the four least developed Western and Central African (WCA) countries of Burkina Faso, Benin, Mali and Chad. As over 90% of the cotton produced in this quad is for export, cotton accounts for upto 75% of the export earnings and is thus vital for the poverty reduction strategies in these countries.⁴¹ However, plagued with extreme poverty and malnutrition, these countries are fighting against illegal cotton subsidies by USA and EU, who have continued to provide billions in subsidies for domestic producers, dumping overproduced cotton at 61% below the cost of production between 1997 and 2002.⁴² These cotton subsidies by the EU and USA have resulted in substantial reduction of cotton prices, from an average of 72 US cents per pound, to 42 US cents per pound in 2001-02.⁴³ Such a collapse has unabatedly till today caused havoc to the already fragile economies of these countries and generated substantial losses in their hard currency earnings.

The right to life is guaranteed under Art.6 of the International Covenant on Civil and Political Rights (ICCPR). Similarly, the ICESCR guarantees to all human beings the right to work, including the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, as well as the right to just and favourable conditions of work (Art.6, 7). The illegal subsidies by US have infringed on these rights of farmers in WCA countries. However, assuming that the four countries were to approach the DSB as complainants challenging the illegal subsidies, there is no way in which they could be compensated reasonably for their losses, thereby permitting violating states (in this case the US) to adopt "hit and run"

⁴⁰ Shahin, Magda (2008), 'The Cotton Initiative', in *Developing Countries and the WTO: Policy Approaches*, Edited by Sampson, G and Chambers, B, Pp.41-61, UNU Press, Tokyo.

⁴¹ Goreux, L (2004), *Prejudice Caused by Industrialized Countries Subsidies to Cotton Sectors in Western and Central Africa*, available at http://www.fao.org/es/esc/common/ecg/306/en/Goreux_Prejudicef.pdf (retrieved on 14/08/2012)

⁴² 3D-->Trade—Human Rights—Equitable Economy & Ethical Globalization Initiative (2004), *US and EU Cotton Production and Export Policies and their impact on West and Central Africa: Coming to grips with international human rights obligations*, www.3dthree.org/en/page.php?IDpage=27&IDcat=5, (retrieved on 14/08/1012)

⁴³ Oxfam (2002), *Cultivating Poverty: The impact of US cotton subsidies on Africa*, available at <http://www.oxfamamerica.org/publications/cultivating-poverty> (retrieved on 14/08/2012)

practices.⁴⁴ This is because financial compensation falls outside of the WTO mandate and is as such not a permitted solution for the aggrieved party. As Magda rightly points out, under Art.22 of the DSU, compensation can be granted to the successful litigant only by two instruments. Firstly, this can be done by offering supplementary concessions for other products. This mechanism cannot apply to these four countries because they only have a few other exports, and in most cases, these already receive preferential access (on account of special and differential treatment). Second, customs tariffs can be increased on imports by these four countries. This is also of little use to the four countries as it will backfire on their consumers. Also, these countries do not import sufficiently from the US to offset their loss in cotton exports. The only way in which the cotton producers from the WCA countries can be compensated for the severe losses they have incurred is through economic compensation, which is not provided for by the DSU.

A perfunctory perusal of the aforesaid might lead one to conclude on first blush that the existing provisions of the DSU are in violation of human rights. However, a closer scrutiny would reveal that this is not so. The legality of a provision is tested on what it says and not on what it does not say. The provision under consideration actually permits compensation by way of tariff modifications and cannot, therefore, be said to violate human rights *per se*. What inures serious human right issues for the four WCA countries is what is absent from the provision – *the inadequacies* - namely economic compensation. This is an example of how WTO laws can limit the policy space that the WCA countries have in order to attend to their obligations to protect human rights of their citizens.

Similarly, one of the oft cited arguments of a WTO law breaching human rights relates to the provisions of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) in the context of patenting of pharmaceutical products by drug companies in the developed world, which results in predatory prices beyond the reach of the poor in the third world. This is again a misplaced argument. None of the existing provisions of the TRIPS Agreement by themselves can be said to breach human rights, including the right to health. There are after all certain waivers that have been incorporated in the original text of the agreement by virtue of the Declaration on the TRIPS Agreement on Public Health in November

⁴⁴ Georgiev, Dencho; van der Borght, Kim (2006), *Reform and Development of the WTO Dispute Settlement System*, P.42, Cameron May, London. The authors describe the practice of States to blatantly violate WTO provisions for the entire period till implementation of DSB judgements as “hit and run” practice.

2001⁴⁵ and later by virtue of, what is known as the August 30 Decision⁴⁶. Thus, these provisions consist of procedures for compulsory licensing and contain certain waivers for the benefit of public health in developing and least developed countries. Test these provisions on what they explicitly say, and no argument can be raised that the same are contrary to the human right to health. The waivers may be inadequate to address the right to health (Art.12 ICESCR) and right to life (Art.6 ICCPR) of citizens in the third world (as perhaps can be evidenced by the fact that till date only Rwanda has formally taken benefit of the existing waivers by notifying the WTO⁴⁷), but even then, the existing waivers being in the nature of flexibilities to the strict patent regime cannot be said to violate human rights *per se*. When critics say that provisions of TRIPS Agreement are harmful to public health concerns of third world, and in most cases rightly so, what they really mean is that lack of additional waivers or flexibilities – *the inadequacies* – lead to human rights concerns. In other words, there is a need for more safeguards and if there were certain additional flexibilities which are presently absent, then some of the human rights concerns of the third world countries could be addressed more efficaciously. It is the lack of these additional flexibilities that limit the policy space that States have in order to attend to their obligation to protect and fulfil the human right to health and life.

The third example of how human rights are affected directly by provisions of WTO Agreements by limiting policy space of States is Art. XX of GATT, a provision we have already discussed above in a different context. This is related to the rigours of trade rules to take measures affecting human rights *within* ones' own borders. As discussed while dealing with the first category, extraterritorial measures to protect human rights are prohibited under WTO agreements. However, insofar as territorial measures are concerned, Art. XX of GATT which lists specific public policy reasons that justify deviation from GATT principles. Those directly relevant for trade-related human rights measures are protection of public morals (paragraph a) and protection of human, animal or plant life or health (paragraph b). In addition to fulfilling the requirements of the specific policy goals, the protective measure has to fulfill the general requirements of Art. XX

⁴⁵ World Trade Organisation: WTO Document No. - WT/MIN(01)/DEC/2 dated 20/11/01 – adopted on 14/11/01

⁴⁶ World Trade Organisation: WTO Document No. WT/L/540 and Corr.1, 30/08/2003.

⁴⁷ World Trade Organisation: http://www.wto.org/english/tratop_e/trips_e/public_health_notif_import_e.htm (retrieved on 14/08/2012), whereby Rwanda notified its intention to import the triple combination AIDS therapy drug, TriAvir, under compulsory licence from Canadian drug company, Apotex, Inc.

(‘chapeau’) viz. it must comply with the principle of non-discrimination, and must not constitute a disguised restriction to international trade. The purpose of the requirements in the chapeau is to avoid abuse of the exceptions of Art. XX. Demonstrating that the requirements of the chapeau have been fulfilled is generally a difficult task and existing case law regarding environmental matters and public health concerns shows that the DSB has so far been quite restrictive in its jurisprudence. For instance, in the *Brazilian Retreaded Tyres Case*,⁴⁸ Brazil’s action to impose a global ban on its import of retreaded tyres under Art.XX(b) on the ground that the same affected the right to health of its citizens was challenged by the EU. Brazil had been forced to grant exemption from its global import ban to the members of the MERCOSUR (Regional Trade Agreement between Brazil, Argentina, Paraguay and Uruguay), who had successfully obtained the said exemption in a judicial proceeding before the MERCOSUR Tribunal. The challenge by EU thus proceeded on the ground that the import ban had been applied to EU by Brazil in a manner that constituted arbitrary or unjustifiable discrimination and a disguised restriction on international trade within the meaning of the chapeau of Art. XX, since it excluded MERCOSUR members. It did not matter that the Brazil did not even want to exempt the MERCOSUR members from the global ban; it was forced to do so by a judicial tribunal. The DSB accepted the contentions of EU by adopting a strict interpretation of the Chapeau, despite agreeing with Brazil that the ban on import of retreaded tyres had a nexus with protection of public health.

The only case in which an action by a State under Art.XX(b) was accepted as valid by the DSB, is the *EC – Asbestos case*.⁴⁹ In that case, the DSB did uphold the right of France to impose an import ban on substances containing asbestos on the grounds of protecting public health of its citizens. The DSB also held that the action by France satisfied all the requirements incorporated under the Chapeau to Art.XX. What this signifies is that it is not easy at all for a State to take measures under Art.XX to protect human rights of their citizens, particularly the right to health. In other words, the Chapeau and the clauses of Art.XX create a serious limiting environment for States to have the policy space for addressing human rights concerns.

⁴⁸ World Trade Organization, Dispute Settlement Dispute: *Brazil – Measures affecting import of retreaded tyres*, DS/332, Appellate Body Report adopted on 17 December 2007.

⁴⁹ World Trade Organization, Dispute Settlement Body: *European Communities – Measures Affecting the Prohibition of Asbestos and Asbestos Products* (WT/DS135), Appellate Body Report, adopted on 5 April 2001, Para 101

Other WTO instruments like the SPS Agreement (Art. 2), TBT Agreement (Art. 2.2) and GATS (Art. 15) also contain similar provisions permitting States to derogate from their trade commitments in order to protect human health and safety, under strict fulfillment of certain requirements. An illustration under the SPS Agreement is the *Hormone Beef Case*,⁵⁰ where the EU action of imposing a ban on import of hormone treated beef was challenged by the United States and Canada before the DSB. While EU contended that it had imposed the ban in order to protect the health of its citizens on the basis of perceived adverse effects of hormone treated beef, the US and Canada argued that the requirement under Art.5 of the Agreement of carrying out a prior risk assessment of the effect of hormone treated beef on human health, were not fulfilled. The Appellate body observed that although there was evidence that there were genuine anxieties concerning the safety of hormone treated beef, the EU ban could not be sustained since it was not based on a risk assessment as is required by Art. 5.

This case again confirms the fact that while WTO agreements do permit States to make certain deviations from their trade obligations in order to protect human health and safety within their territories, the provisions operate in a manner that do not serve the purpose of creating such flexibilities. The policy space of States that is sought to be safeguarded by introduction of the Exception Clauses is, in fact, quite limited, as the empirics show.

It is clear from all three examples above that some WTO rules clearly tie up States and their policy spaces in ways that do not allow them to take the necessary measures to sufficiently address human rights concerns of their citizens.

Where the curbing of policy space happens because of inadequacies in WTO rules, can the DSB step in and expand the policy space by way of interpretation? We have already seen that the rule of harmonious construction does not permit adding or diminishing WTO provisions with human rights obligations by way of interpretation. Indeed, to fill up the absence of necessary provisions in the WTO agreements is not an interpretative function which the DSB can assume upon itself. Thus, even if the provisions of WTO agreements are not complete enough to respect,

⁵⁰ World Trade Organization, Dispute Settlement Body: *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, DS/47 and DS/48, Appellate Body Report adopted on 13/02/1998

protect and fulfill human rights, the rules of interpretation do not permit the DSB to read in human rights obligations into the WTO provisions, to fill up the inadequacies and expand the policy space of States.

Unfortunately, States have tended to compartmentalize their legal commitments - on the one hand as WTO members, and on the other, as States parties to human rights treaties under the UN. The rhetorical and policy disconnect between these areas has led most States to disregard their binding human rights obligations while pursuing trade negotiations.⁵¹ The WTO position itself has for a long time been dominated by the 'watertight compartment's view'⁵² i.e., the WTO is a trade organization, not a human rights organization. WTO diplomats and WTO judges have a longstanding preference for avoiding human rights discourse in WTO bodies.⁵³ Additionally, States themselves do not agree to read into WTO Agreements, human rights treaty obligations exogenous to these Agreements; hence the opposition to incorporation of a human rights clause.

Where then does the obligation on States to address this lack of policy space lie? There is clearly a deadlock, and, therefore, a need to find a pragmatic argument which warrants States to take into consideration human rights concerns at all stages of the WTO processes, including pre-negotiation, negotiation and trade policy review, so that this policy space is not unjustly limited by WTO rules, and where these are unjustly so limited, the same are removed by States. However, this lack of policy space has to be addressed not by the DSB's interpretative process, but by some other established procedure.

This approach warrants a search within the WTO Umbrella Agreement itself for an obligation upon States to respect, protect and fulfill human rights. If there does exist such an obligation not exogenous to the WTO Agreements, then it provides legitimacy to the arguments that human rights must be taken into consideration by States while acting at the WTO as a matter of internal WTO obligations. It would also validate arguments that human rights must be the central purpose of international trade, as opposed to purely economic interests. The point of departure would, therefore, be to

⁵¹ Op. Cit FN 17, at P.4

⁵² United Nations: *Economic, Social and Cultural Rights: Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization*, Howse, Robert, 9 June 2004,

E/CN.4/Sub.2/2004/17, para. 20.

⁵³ Op. Cit. FN 13, at P. 180

acknowledge that trade and economic growth are not ends in themselves,⁵⁴ but are a means to promote human rights.

This link can be found in the Preamble of the Umbrella Agreement itself, which incorporates ‘sustainable development’ as one of its principal objectives. Thus, WTO’s mandate clearly is to frame all trade policies and agreements in a manner that would achieve sustainable development. In other words, trade policies and agreements cannot be counterproductive to the very institutional objective of achieving sustainable development. It is well established that this concept encompasses three general policy areas: social development, economic development and environmental protection. This has been reiterated by several United Nations texts and many World Summit Outcome Documents.⁵⁵

Right to Development as a Human Right

At the same time, the 1986 Declaration on the Right to Development by the UN General Assembly has also recognized the right to development as a human right.⁵⁶ The Declaration was adopted by a vote of 146 to 1 (the US opposing) with 8 abstentions. The Preamble of this Declaration states that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom. This definition of the term ‘development’ is relatively elastic, but nevertheless a people-centered approach to what is meant by development.

It is also in line with the work of Amartya Sen who explains development as the expansion of freedom of choice for human beings, both in terms of ‘processes that allow freedom of actions and decisions, and the actual opportunities that people have, given their personal and social circumstances’.⁵⁷

⁵⁴ Op. Cit. FN 17, at P.1

⁵⁵ United Nations, World Millennium Summit (2005): GA Doc. No. A/60/L.1, available at <http://www.unep.org/greenroom/documents/outcome.pdf> (retrieved on 14/08/2012)

⁵⁶ United Nations, General Assembly: *Declaration on the Right to Development*, GA/41/128 of 4/12/1986, available at <http://www2.ohchr.org/english/law/rtd.htm> (retrieved on 14/08/2012)

⁵⁷ Sen, Amartya (1999), *Development as Freedom*, P.17, Oxford University Press, UK. See also United Nations, Economic and Social Council: *The Legal Nature of the Right to Development*, E/CN.4/Sub.2/2004/16 of 1 June 2004

Article 1(1) of the Declaration proclaims that ‘the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized’. The human person is the central subject of development and should be the active participant and beneficiary of the right to development [Article 2(1)]. Various provisions of the Declaration oblige States to frame policies which would propagate and further the human right to development of their citizens.

What follows from the aforesaid provisions is that the right to development is a self-standing right. At the same time, it is a composite of all other internationally recognised rights and freedoms. There are strong arguments today that the human right to development has become part of customary international law and States are obliged to ensure the same to their citizens. The *opinio juris* of States is evident from the fact that 146 countries voted in favour of the Declaration. Furthermore, States have consistently and emphatically reiterated thereafter, that the Right to Development is an inviolable human right.⁵⁸ States also confirm the same in their practice by acting extensively and uniformly in virtually all fields of international law according to the principles set out in the 1986 Declaration.⁵⁹ The Millennium Development Goals and the unequivocal commitment to them by States in their domestic policies is an eloquent example of this. Undoubtedly, sceptics have raised arguments that the ‘right to development’ is not yet a part of customary international law, and being incapable of judicial enforcement, is therefore, not legally binding upon States; as such it is not a human right at all. However, this argument is fallacious because it erroneously equates human rights with legal rights. In order to be recognized as a human right, the same need not necessarily be a legal right capable of judicial enforcement.⁶⁰ There is no doubt, therefore, that the

⁵⁸ Vienna Declaration and Programme of Action, World Conference on Human Rights, 48th Session (1993), UN Doc. A/CONF.157/23(1993)

⁵⁹ Op. Cit. FN. 10, at P.199. Also see for a detailed analysis of Right to Development as Customary International Law - Aleinikoff, Thomas Alexander and Chetail, Vincent (2003), *Migration and International Legal Norms*, P.260, T.M.C. Asser Press, The Hague, Netherlands. See also Bedjaoui, Mohammed (2008), ‘The Right to Development’, in *International Human Rights in Context*, Edited by Steiner et.al., P. 1447, Oxford University Press, UK, for the extreme proposition that Right to Development is a jus cogens norm.

⁶⁰ See Sengupta, Arjun (2002), *On the Theory and Practice of the Right to Development*, Human Rights Quarterly 24 (2002) 837-889, at P.859, where he explains that in order to be a human right, it is not necessary that it be also recognized as a legal right. See also James Nickel (2007), ‘Human Rights as Rights’, in *Making Sense of Human Rights*, Pp.22 to 34, Blackwell Publishing.

Right to Development is a human right. The dispute regarding its legally binding nature as part of international human rights law is on-going, but it is neither important nor decisive in the context of the present analysis. Assuming that there is no legal obligation on States to fulfil this right to development as a self-standing right, there can be no doubt that by virtue of the very nature of this right also being an amalgam of all other undisputed human rights, States are legally obliged to respect, protect and fulfil at least the components thereof, and hence in effect, the very right itself.⁶¹ In any case, there can be no doubt that by virtue of the Declaration and individual State practice, this human right, at the minimum, qualifies to be a political and moral obligation of States. This minimum position is sufficient for the purposes of the argument presented hereinunder.

The Right to Development and Sustainable Development

The concept of right to development incorporates the notion of sustainable development and all of its three pillars. Similarly, sustainable development is inherently wedded to human rights and cannot be fulfilled without also fulfilling the *specific* human right to sustainable development. One cannot survive without the other since both are interdependent and mutually overlapping. This is irrespective of whether the right to development is part of customary international law and is therefore a legal obligation, or whether it is just a political or moral obligation. In a report prepared for the OHCHR in 2004, Gutto has rightly noted that the Right to Development very well includes the notion of sustainable development and that the former actually translates as the ‘Right to Sustainable Development’.⁶²

Bringing WTO Into the Picture

It is in this factual matrix that the link between human rights and trade can be found through the objective of ‘Sustainable Development’ in the WTO Agreement itself and not in extraneous human rights treaties. States are obliged to take into consideration human rights while operating at the WTO because the *institutional objective* of the WTO to ensure sustainable

⁶¹ See United Nations, Economic and Social Council: *Study on the current state of implementation of the Right to Development*, E/CN.4/1999/WG.18/2, Arjun Sengupta, Independent Expert on the Right to Development, 27 July 1999. In this report Sengupta describes Right to Development as a vector, where the vector itself is a self-standing human right; at the same time the vector is also composed of all other human rights. In order, therefore, for States to improve the Right to Development, it is important that at least one of the components of the Vector is enhanced, while none others deteriorate.

⁶² United Nations, Economic and Social Council: *The Legal Nature of the Right to Development*, E/CN.4/Sub.2/2004/16, Gutto, Shadrack, 1 June 2004.

development, as enshrined in its Preamble, mandates so. Human rights are inextricably linked to development, whilst development is inseparably linked to trade. It may be worthwhile to point out, in particular, the provisions of paragraph 3(3) of the 1986 Declaration which mandates States to realize their rights and fulfil their duties in such a manner as to promote ‘a new international economic order’ based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights. This clause in particular has utmost significance inasmuch as States knew throughout the Uruguay round of negotiations around the same time and while establishing the WTO almost a decade later, that they had committed to establishing a ‘new international economic order’ in terms of what paragraph 3(3) of the 1986 Declaration conceived.

In sum, the concept of the right to development suggests that the ‘appropriate’ development strategy is one that conforms to the international human rights framework. By finding this link of development between the human rights regime and the international trade regime, we cull out a pragmatic approach which should rest to calm all the opposition of States for bringing in exogenous human rights treaties into the WTO processes.

Now, it needs to be acknowledged that this human right to development approach does not permit a claim to be made before the DSB by any party that the trade policies of another party are illegal because they breach the human right to development. This is because the obligation of States to formulate WTO policies with the aim of furthering the human right to development is borne in the concept of sustainable development enshrined in the Preamble of the WTO Umbrella Agreement. Canons of interpretation of treaties do not accord the same value to Preambles as they do to substantive provisions themselves. A substantive provision can be breached and the same can be challenged before the DSB. On the other hand, the Preamble has a role limited to the interpretation of WTO Agreements viz. only to provide the context for interpreting substantive provisions. However, the fact still remains that the Preamble of the WTO Umbrella Agreement asserts the purposes and objectives of the WTO in no uncertain terms and therefore, even if the same cannot be enforced through the DSB, States are obliged to take them into consideration while negotiating and acceding to WTO Agreements. Similarly, if any inadequacies are found in the existing Agreements whereby human rights concerns remain unprotected, or if the policy space of States to adequately deal with their human rights concerns is found lacking as a result of WTO obligations, the objective of sustainable development obliges States to

remove them by subsequent negotiations. Given this position, this human right to development-based approach needs to be incorporated at all stages of the WTO process, including the stages of pre-negotiation, negotiation and trade policy review.

To put this into context, the inadequacies in the DSU relating to economic compensations and in the TRIPS Agreement relating to additional waivers need to be rectified by way of negotiations, because the objective of sustainable development obliges so. Similarly, the lack of policy space created by the manner in which Art.XX of the GATT operates needs to be removed, because the objective of sustainable development obliges so. One way to avoid negative impacts of trade regulations on the human rights situation in the Member States is through a 'human rights impact assessment' of WTO Agreements, policies and decisions. Human rights impact assessments, at the very least, facilitate an informed negotiating and trade policy review process at the WTO. This mechanism has been explored before and as such will not be developed in this paper.⁶³ The purpose here is to clearly identify this second category and to find a pragmatic approach to addressing it. The approach essentially calls for undoing the limiting environment that some WTO laws create, with respect to the policy space of States to address their own human rights concerns. States need to do so because the institutional objective of the WTO is sustainable development, which cannot be achieved without ensuring that all human rights are respected, protected and fulfilled. This revisiting of the WTO provisions that limit policy space of States cannot be done by the DSB, but must be done collectively by States themselves at the WTO. They need to do so as part of their international law obligations, through negotiating amendments to the already existing WTO laws. Similarly, while negotiating new WTO agreements, States must essentially take into account the impacts that trade laws may have on their policy space to address their human rights concerns.

D. CONCLUSION

In conclusion, it may be said that economic globalization in general and liberalization of trade in particular, are seemingly irreversible processes. Barring global catastrophes such as world war or climate change, they are

⁶³ For a detailed analysis of HRIA methods, see <http://www.humanrightsimpact.org/introduction-to-hria/hria-tutorial/introduction/> (retrieved on 14/08/2012). See also Harrison, James and Goller, Alessa (2008), *Trade and Human Rights: What does 'impact assessment' have to offer*, (2008) Human Rights Law Review 8 (4), 587.

here to stay and in my judgment there is simply no going back now. All WTO members have invested massively in creating structural changes to their economies in order to adhere to the New World Order. India, China, Brazil and South Africa are eloquent examples of Developing Countries benefiting from the liberalized trading regime in general. However, it is a fact that these countries, along with other Developing Countries, also face significant human rights challenges in adjusting to this relatively new multilateral trading regime. The right to employment, work and health, amongst others, are casualties in the process for many of the poorer States. Even so, the fact of the matter is that States have legally bound themselves to the liberalized trading regime, on the economic logic that these casualties should be transitory, and eventually comparative advantages would adjust themselves along with the citizens working within these economies. In view of the fact that liberalization is probably irreversible, a pragmatic approach is needed to handle the complex multilateral trade-human rights linkages. The appropriate manner, therefore, in which these concerns should be addressed, is through a human right to development approach as discussed above. There is a growing literature orientating towards this approach, and methods to embed this culture in the WTO so that it permeates through all its processes, should be the vision for further action. Human Rights Impact Assessments provide a good starting point in this context; however, other means could also be developed. In the same breath, it is important to realize that the complexities and multidimensional nature of the multilateral trade-human rights linkages should not be a concern of States under only the WTO. The deconstruction of these linkages carried out in this Paper demonstrates that in some areas, the UN and in particular, its specialized agency - the ILO, must also take on the responsibility. Pragmatism mandates that methods to address concerns arising from these linkages must be developed within the existing systems themselves. Thus, cooperation from all actors involved in these linkages - the States, the UN and the WTO - is inevitable for both the human rights regime and the international trade regime to co-exist. In the last few years, steps have been taken by the UN, the WTO and the Breton Woods Institutions to constitute Annual High-Level Meetings comprising of representatives from all the institutions to work progressively towards achieving their respective mandates.⁶⁴ This is again a good starting point and an acknowledgement of the fact that the issue of multilateral trade-human rights linkages demands a pragmatic approach to be addressed. This is ultimately the only way in

⁶⁴ See for more information- World Trade Organization: *The WTO and United Nations*, available at http://www.wto.org/english/thewto_e/coher_e/wto_un_e.htm (retrieved on 14/08/2012)

which the solemn objectives enshrined in the Preambles of both the UN Charter and the WTO Umbrella Agreement can be fulfilled, without these institutions condemning each other or without States compartmentalizing their international law obligations into two separate camps that are completely isolated from each other. In contrast, the pragmatic approach proposed here could insure international integration and linkages between the existing legal obligations of states in both the WTO and human rights.

THE GLOBAL AND THE REGIONAL IN THE RESPONSIBILITY TO PROTECT: WHERE DOES AUTHORITY LIE?

Prof. Bernard Ntahiraja*

Introduction

On 20 May 2011, on their way to Tripoli, delegates of an African Union (AU) ad hoc high-level committee were refused “permission” to land on the Libyan territory, not by the Libyan government nor the then armed wing of the National Transitional Council (NTC), but by a United Nations commission in charge of the implementation of the 1973 UNSC Resolution on Libya. The delegates were carrying a mandate from the African Union with respect to the conflict that was going on in Libya.¹ Observers saw the incident as a humiliation of Africa and of its continental organization. However, by placing the incident into its broader context, we can see the complex relationships between the World Organization and regional organizations when it comes to the implementation of the Responsibility to Protect (R2P). The AU is taken as an example, not because the incident happened in Africa but because Africa is the Continent counting by far the biggest number of regional peace and security mechanisms and missions.²

Both the Charter of the United Nations and the evolving doctrine of the Responsibility to Protect (R2P) recognize the role of regional actors in building peace and security. Indeed, the United Nations alone cannot achieve peace and security, underscoring the importance of regional organizations. The relationship between the UN and regional organizations becomes all the more complex when enforcement action is involved, i. e. when military, political or economic measures are to be applied against the will of the state concerned. A simple – perhaps overly simplistic approach –

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¹ William Davison and Oudaa Marouf, ‘African Union Panel is Denied Permission to Land in Libya’, <http://www.bloomberg.com/news/2011-03-21/african-union-negotiating-committee-is-denied-permission-to-land-in-libya.html> at 20 August 2012.

² The logical explanation might be that Africa also counts the biggest number of conflicts. According to one non-profit organization, there were ten active armed conflicts in Africa during 2011 alone. ‘Conflict Descriptions’, Project Ploughshares, <http://www.ploughshares.ca/content/conflict-descriptions> at 20 August 2012.

would be to vigorously and literally enforce Chapters VII³ and VIII⁴ of the UN Charter, which give primacy to the organ of the United Nations in charge of peace and security: the Security Council. Taken together, they *subordinate* regional organizations to the Security Council.

Some authors argue that the Charter regime does not apply anymore and that the Security Council has *delegated* its power to use force to regional organizations, and that the latter can take and implement enforcement measures *autonomously*. There is even a theory that sees the UN and regional organizations as coexisting under two parallel regimes: the *charter system* establishing the supremacy of the Security Council and the *operational system* recognizing that, depending on the issues at stake, enforcement action without the Security Council authorization may be lawful.⁵

The point of this paper is not to declare what the law definitely is. It is not to ‘adjudicate’ and say which of the above theories is the right one. On contrary, it is to highlight the legal uncertainty characterizing the issue. While still acknowledging the supremacy of the UN Charter in affairs under Article 103,⁶ this paper argues that a valid interpretation of the Charter must take into account evolutions that took place after the 1945 and 1945 constitutive conference. The article demonstrates how the most official document establishing the Responsibility to Protect so far, the World Summit Outcome Document,⁷ missed the point by simply and literally

³ United Nations Charter, Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, United Nations, <http://www.un.org/en/documents/charter/chapter7.shtml> at 20 August 2012.

⁴ United Nations Charter, Chapter VIII: Regional Organizations, United Nations, <http://www.un.org/en/documents/charter/chapter8.shtml> at 20 August 2012.

⁵ M. Hakimi, ‘To Condone or Condemn-Regional Enforcement Action in the Absence of the Security Council Authorization’, *Vand Journal of Transnational and International Law* (2007).

⁶ ‘In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.’ Charter of the United Nations, Art. 103, <http://www.un.org/en/documents/charter/chapter16.shtml> at 20 August 2012.

⁷ 2005 World Summit Outcome, United Nations, paras. 138-140 at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement> 20 August 2012. (“Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.”)

stating the charter rule as the exclusive legal reference for the issue enforcement action. An opportunity to contribute to the progressive development of international law was lost in a way likely to undermine the R2P agenda.

The author of this paper is aware that, contrary to a widely shared belief, Responsibility to Protect is not synonymous to enforcement action. Use of force against a sovereign state remains a difficult proposition even under modern international law. Theoretically, it is a measure of last resort under both the Charter and R2P. Understandably, it is the most controversial form of intervention. In this paper, enforcement action is discussed from the perspective of the AU-UN relationship. Other aspects of that complex relationship, like possible disharmonies in approaches to conflict management, will be shortly addressed. These disharmonies center on the United Nations' preference for military action as opposed to the African Union's preference for political solutions to a conflict. Theoretically, the reverse situation is possible for other regional organizations working with the UN.

This article begins by looking at the pre-R2P state of affairs, with particular reference to the Charter rule. That part of the paper will underscore that the literal interpretation of the relevant provisions, especially Article 53,⁸ has always been challenged in law as well as in practice. Part II of the article will analyze whether the R2P doctrine has had any impact on the relationship between the UN and the AY. Part III, the shortest, will briefly look at the issue of contradicting strategies between the UN and the regional organizations. A conclusion will end the paper.

I. Enforcement action and the relationship between the UN and regional organizations under the Charter.

1. The letter of the Charter

The framers of the United Nations Charter had foreseen the necessity to involve what they called regional “agencies” or “arrangements”⁹ in the

⁸ United Nations Charter, Art. 53, <http://www.un.org/en/documents/charter/chapter8.shtml> at 20 August 2012.

⁹ See e.g., United Nations Charter, Art. 33(1), <http://www.un.org/en/documents/charter/chapter6.shtml> at 20 August 2012 (“The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”)

maintenance and restoration of international peace. They dedicated the whole chapter VIII of the Charter to that issue. The latter makes a clear distinction between political and military approaches to conflict management or resolution. For political and diplomatic intervention, The UN and regional organisations do have equal power. Priority is even recognized to regional actors. When the action doesn't involve use of force, priority is recognized to regional arrangements or agencies. Article 52, paragraph 2 of that instrument states that:

The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve *pacific settlement* of local disputes through such regional arrangements or by such regional agencies *before referring them to the Security Council* (emphasis added).¹⁰

However, when force is to be used, the Security Council seems to be the supreme and unique power holder. Therefore, interventions by regional organizations need, at least, to be authorized. Paragraph 3 of the article 53 of the Charter clearly states that:

The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But *no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council* (emphasis added).¹¹

The delegates at the 1945 San Francisco conference focused closely on the use of force. Abuses of military power were still fresh in the collective memory of the delegates, who aspired to prevent history from repeating itself. That is why one of the key principles of United Nations membership is to refrain “from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations”.¹²

The issue was taken so seriously that even the two admitted exceptions, self-defense and enforcement action, are strictly submitted to the Security Council's control: self-defense is legal only as long until the Security Council has had the opportunity to take action itself.¹³ Entities undertaking self-

¹⁰ <http://www.un.org/en/documents/charter/chapter8.shtml> at 20 August 2012.

¹¹ Ibid.

¹² United Nations Charter, Art. 2(4), <http://www.un.org/en/documents/charter/chapter1.shtml> at 20 August 2012.

¹³ See e.g. United Nations Charter, Art. 51, <http://www.un.org/en/documents/charter/chapter7.shtml> at 20 August 2012.

defense measures are also obliged to report to the Security Council. As for enforcement action, it up to the Security Council to place its imprimatur on its use, which will open happen when other measures 'would be inadequate or have proved to be inadequate'.¹⁴

It is commonly accepted that the Charter's prohibition to use force, except in the two above mentioned cases, applies not only to nation-states but also to regional arrangements.¹⁵ The question is what those organizations can legally do without bypassing the Charter. Like states acting individually, regional arrangements do have some legal powers but their action is strictly controlled by the Security Council. The primacy that Chapter VIII gives the Security Council reflects the compromise made at the San Francisco Conference, where there were heated debates concerning the proper relationship between, on the one hand, the bodies of the United Nations and, on the other hand, regional arrangements created separately from the United Nations. The delegates in San Francisco ultimately agreed to allow regional arrangements to act in self-defense without obtaining Security Council authorization but to require such authorization for enforcement actions.¹⁶ Security Council control in this area was considered necessary to prevent isolated regional arrangements from acting without global accountability and without regard for the global interest in international peace and security.¹⁷

According to a certain doctrine, when the Security Council authorizes a regional organization to use force in cases other than self-defense, the latter is just given the permission to act on the behalf of the former.¹⁸ This does not, however, mean that the Security Council could also delegate the ultimate control of the military operations to the organization engaged in it. It is argued that this would amount to a complete abdication of powers and it would undermine the centralized nature and institutional structure of the charter in the context of international peace and security.¹⁹ Furthermore, the Security Council cannot legally delegate that power, being itself a delegate of the UN member states: *delegatus non potest delegare*.²⁰ It is therefore a duty for

¹⁴ United Nations Charter, Art/ 42, <http://www.un.org/en/documents/charter/chapter7.shtml> at 20 August 2012.

¹⁵ Above n 5.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ De Wet, E., 'The relationship between the Security and regional Organizations during enforcement action under chap VII of the United Nations Charter', *Nordic Journal of International Law* (2012) 71, 1-37.

¹⁹ Ibid.

²⁰ Ibid. at 11.

the Security Council to keep controlling regional organizations it has authorized to act militarily.

De Wet argues that the prohibition of open-ended mandates to regional organizations in matters of international peace and security is dictated by the fact that centralization of the use of force is the cornerstone of the Charter.²¹ Thus with the exception of those undertaken for self-defense, military interventions by regional organizations have to be authorized by the Security Council. They are otherwise illegal, even in cases of gross and systematic human rights violations.

Politically speaking, challenging the exclusive authority of the Security Council has been viewed as a challenge to the United Nations, and even worse, as weakening international law:

Those who challenge or evade the authority of the UN as the sole legitimate guardian of international peace and security in specific instances run the risk of eroding its authority in general and also undermining the principle of a world order based on international law and universal norms.²²

Does this orthodox view prevail unquestioned? Does literal interpretation of the charter tell the whole story? A review of state practice and its recognition by the international community suggests that it does not.

2. Pre-R2P challenge to the literal interpretation of the Charter

Long before the emergence of the Responsibility to Protect doctrine and the questioning of the exclusive authority of the Security Council by regional organizations, the challenge from within the United Nations was a reality. In 1950 and 1956, the General Assembly took the “United For Peace Resolutions” and sent military missions respectively in Korea and Egypt.²³ The Security Council was in deadlock following the decision of the former USSR to walk out after Taiwan was admitted to the United Nations. Interestingly enough, the General Assembly never claimed to have legally taken over the Security Council’s power. Officially, its support to the mission was a kind of political and moral substitute to the legal blessing that would have come from the Security Council. The message conveyed was that, even in the absence of Security Council endorsement and with the

²¹ Above n 18.

²² Garth Evans, ‘The Responsibility to Protect’, NATO Review, <http://www.nato.int/docu/review/2002/issue4/english/analysis.html> at 21 August 2012.

²³ United Nations, <http://untreaty.un.org/cod/avl/ha/ufp/ufp.html> at 21 August 2012.

General Assembly's power only recommendatory, an intervention which takes place with the backing of a two-thirds vote in the General Assembly would clearly have powerful moral and political support. However, most of the challenges are found in the practice of regional organizations like the the Economic Community of West African States (ECOWAS), the Organisation of American States (OAS), and the North Atlantic Treaty Organisation (NATO).

In 1990, the ECOWAS undertook an enforcement action to establish peace in Liberia. The Organisation did not obtain Security Council authorization and did not attempt to justify the action in terms of the Charter system. Literally speaking, this could have been looked at as a brutal violation of the Charter. Nevertheless, the international community reacted positively. Hakimi notices that, for months, the Security Council simply ignored the conflict in Liberia, as well as the fact that ECOWAS had taken an unauthorized enforcement action. He further observes that, when the Council finally considered the issue, first in January 1991 and later in its Chapter VII Resolutions, it commended ECOWAS for its efforts to establish peace in Liberia without mentioning the authorization requirement of Article 53.²⁴

Some scholars have interpreted the Security Council's commendations to constitute retroactive authorization for purposes of Article 53. This interpretation is just convenient because it places the international response to the Liberian conflict within the legal framework of the U.N. Charter. But it is not completely accurate. The Security Council did not, in fact, authorize any enforcement action. The Resolution 788 frequently cited by scholars holding those views invoked the Council's Chapter VII authority, but it did so only to impose the arms embargo and not also to authorize the use of military force. Moreover, there is some evidence that the failure to authorize the use of force was deliberate. Western diplomats at the U.N. were prepared to authorize only political and not military action in Liberia. Thus, the fact that the Security Council commended ECOWAS for its multifaceted efforts to establish peace in Liberia does not translate into Security Council authorization for the enforcement action per se. And even if it did, the Security Council's "authorization" in November 1992 would not explain the failure of the international community to enforce the Charter system up to that point, i.e. for two years.²⁵ The military intervention in Liberia by ECOWAS took place without any authorization

²⁴ Above n 5.

²⁵ *Ibid.*

by the Security Council but no one, not even the Security Council, regarded it as unlawful. On the contrary, it was praised by almost the entire international community. ECOWAS in Liberia is not an isolated case.

In 1962, that is thirty but two years before ECOWAS intervention in Liberia, the United States and other members of the OAS had imposed quarantine on Cuba to stop it from receiving missiles from the Soviet Union. The quarantine was an enforcement action taken without Security Council authorization, but most other states tolerated or even supported the action. The states that openly supported the quarantine acted as if it raised no questions under the Charter system.²⁶

There is no question that the quarantine constituted the threat or use of force under international law. Notably, neither the United States nor the OAS attempted to justify the quarantine in terms of self-defense.²⁷ Some scholars argued that the quarantine was not prohibited under Article 2(4). Others argued that the quarantine was a lawful act of self-defense, on the understanding that the deployment of nuclear weapons in Cuba constituted either an effective “armed attack” for purposes of Article 51 or an imminent threat of armed attack for purposes of the doctrine of anticipatory self-defense. These arguments are not absurd, but they require interpreting the Charter in a way that is inconsistent with the security framework it originally established. As Professor Riesman and Andrea Armstrong explain:

The United Nations Charter’s prescription with respect to the use of force is essentially binary: either a use of military force is in self-defense, as that concept is conceived in the Charter, in which case it is lawful, or it is not, in which case it is unlawful. As for the right to resort to military measures in self-defense, it materializes only when the state invoking it has suffered an “armed attack,” a stricture that does not even extend to the *Caroline* doctrine of anticipatory self-defense.²⁸

What is interesting to note in both interventions is *not* that the involved organizations (OAS and ECOWAS) did not request authorization from the Security Council prior to their military operations. This is just a fact. The most interesting legal lesson from those cases is that the interventions have been welcome and praised, even by the UN organ in charge of peace and security. This is more than a political statement. It is a legal seal of approval. It means that a customary rule is developing. ECOWAS in Liberia and the

²⁶ Ibid.

²⁷ Ibid. at 17.

²⁸ Ibid.

OAS in Cuba are just cases.²⁹ How this custom can coexist with the Charter rule is another issue.

Hakimi argues that two different legal systems govern enforcement action taken by regional arrangements. One system is reflected in the Charter text and publicly endorsed by major international actors. The second, more nebulous system is based on expectations and demands in the absence of Security Council authorization. Under this second system, the international community may discreetly tolerate a deviation from the Charter rule depending on the substantive interests at stake, the circumstances surrounding the lack of authorization, and the characteristics of the acting regional arrangement.

What should we understand by the substantive interests at stake, the circumstances surrounding the lack of authorization, and the characteristics of the acting regional arrangement?

According to Hakimi, what the international community deems sufficient enough an interest to warrant 'unauthorized' use of force largely depends on context. The international community is notoriously fickle in protecting international norms. Major actors sometimes but not always believe action is appropriate to cease a humanitarian crisis, to prevent an incident of nuclear proliferation, or to eliminate terrorist havens. The international response in any particular case thus turns on the context in which these norms are implicated and the extent to which they conflict with other interests.

As a general matter, however, the international community is more likely to acquiesce in an unauthorized enforcement action where the interests being satisfied relate (in some way) to the maintenance of international peace and security. The use of force to maintain international peace and security is an established component of the international legal process and is provided for in the U.N. Charter. Of course, the Charter also requires that such actions be authorized by the Security Council, but the failure to obtain Security Council authorization does not eliminate the weight of the substantive interest.³⁰

With respect to the circumstances surrounding the lack of authorization, the author first of all observes that regional arrangements presumably forgo the authorization requirement of Article 53 because they expect not to obtain

²⁹ Above n 5.

³⁰ Ibid.

authorization. However, the circumstances in which such authorization is forgone will vary widely and will influence the international response. It matters, for example, whether and in what way the Security Council is seized of the matter when the regional arrangement acts. It also matters whether the regional arrangement takes steps to involve the Security Council or attempts to circumvent the Council altogether. It finally matters why Security Council authorization would not be forthcoming. This means that international actors will analyze the situation differently if they view a permanent member as being intransigent based on motives unrelated to the issue at hand than if they believe there are legitimate reasons for the Council not to authorize the use of force.³¹

As for the characteristics of the regional arrangement, the international community will consider, for instance, whether that arrangement has any connection to the target of the action and whether it is subject to any controls. First, the international community is more likely to tolerate a deviation from Article 53 where the regional arrangement has a unique connection usually based on geography to the subject of the action. Regional arrangements are understood to have a strong interest in addressing threats that originate within their own regions, and they often have the tools necessary to respond quickly and effectively. Therefore, it is acknowledged that regional arrangements may be better suited than the universal organs of the United Nations to address local threats to peace and security. This is particularly the case where the regional arrangement acts against one of its own member states. In that event, the targeted member state may be deemed to have “bought into” the regional regime within which the regional arrangement acts.³²

It might look obvious that regional organizations can only act against their own members. The truth is that this is not always the case. The NATO campaigns in Kosovo and Libya suggest caution. The scope of this article doesn't allow going further in the distinction between the ‘regional arrangements or agencies’ that the Charter talks about in chap. VIII and the regional defense organizations like NATO or the former Warsaw Pact. It suffices mentioning that the latter are formed mainly for self-defense purposes against external aggressions.

The debates that preceded the adoption of the doctrine of the Responsibility To Protect showed that more flexibility was to be expected in the law of use of force. But predictably, the controversial nature of the issue

³¹ Above, n. 29.

³² Ibid.

obliged the promoters of R2P to make some steps back. To gain consensus, the document of the new framework choose to reassure the most conservative states to have them on board. The exclusive authority of the Security Council was reaffirmed, despite that it had been repetitively and consistently challenged, as above mentioned.

II. The Responsibility to Protect and the Security Council's exclusive power to authorize enforcement action

1. The 2004 World Summit Outcome Document: A restatement of a fallacy.

In the year 2004, in the debates about the United Nations Reform, the concept of Responsibility to Protect was officially taken up by the World Summit. Its definition, justification, pillars and implementation policies are part of the Outcome Document of the Summit.³³ The legal value of that report and thus of the R2P is beyond the scope of this article.

Much like the Charter did with respect to international peace and security more than sixty years ago, the R2P framework recognizes that the collaboration between the Security Council and regional organizations is necessary and even inevitable. On the issue at discussion here, i.e. military intervention, the report of the Summit provides that:

We are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by- case basis and *in cooperation with relevant regional organizations as appropriate*, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity (emphasis added).³⁴

The report avoided, in very clear terms, any possible ambiguity about the meaning of the word 'collaboration' between the Security Council and Regional Organisations as far as enforcement action is concerned. It literally cited the report of the International Commission on Intervention and State Sovereignty (ICISS), as completed and submitted to the General Assembly three years before. It states that:

³³ Above n 7.

³⁴ A. Ademola, 'The African Union and the Responsibility to Protect', in J. Hoffmann & A. Nollkamper (eds) *The Responsibility to Protect: From Principle to Practice* (2011) 119.

The Commission is in absolutely no doubt that *there is no better or more appropriate* body than the Security Council to deal with military intervention issues for human protection purposes. It is the Security Council which should be making the hard decision in the hard cases about overriding state sovereignty (emphasis added).³⁵

Although the Commission took that standpoint, reflecting, as it states itself, the international consensus at that time, it was aware of the shortcomings of the Security Council. It even recognised that there was a legitimacy issue to be dealt with. The conservative position it took was apparently the only way to assure states afraid of possible imperialist agendas, hidden behind the noble concept of the Responsibility to Protect. It thus stated that:

If international consensus is ever to be reached about when, where, how and by whom military intervention should happen, it is very clear that *the central role of the Security Council will have to be at the heart of that consensus*. The task is *not to find alternatives to the Security Council as a source of authority*, but to make the Security Council work much better than it has.³⁶

The World Summit ignored entirely the *contra legem* customary rule which was developing at that time. Worse, no stock was taken of the law developed by regional organisations. Nor did the final report take into consideration strong reactions to the ICISS proposals on that issue, submitted to the General Assembly by those organisations before the Summit, like the one from the African Union.³⁷

2. African Union Law and the centralization of use of force

a. The Constitutive Act of the African Union and its additional protocols

In 2002, a ‘revolution’ took place in the law and politics of the African Continental Organization. The context was the creation of the African Union. The defunct Organization of African Unity (OAU) had been created in 1963 with the main aim of preserving the independence of the new states and to politically support the African peoples that were still under colonization or apartheid. Therefore, it is not surprising that the organisation established in its charter and based its policies on the two principles of *sovereign equality of all member states* and *non-interference in the internal*

³⁵ Ibid at 222.

³⁶ Ibid.

³⁷ Above n 7.

affairs of states.³⁸ The two principles were strongly reaffirmed not only out of fear of European imperialism but also partly out of the desire of larger members of the OAU to allay the fears of smaller ones concerned that they would be overwhelmed by greater force in frontier disputes.

As respectable and relevant as they might have sounded at their time, the above principles prevented the OAU from acting in the prevention and management of intra-state conflicts. In the twenty-first century, strong claims of democracy and human rights made it necessary to rethink state sovereignty in Africa. As far as security is concerned, tragedies like the Rwandan genocide made it impossible to go on admitting that states could do whatever pleases them inside their borders. It is in this context that Article 4(h) of the Constitutive Act³⁹ establishes the “the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity”, as one of the key principles in accordance with which the Union has to function. This was saluted as a shift from *non-interference to non-indifference*.⁴⁰ From a legal perspective, the shift is significant because it happened even before the adoption of the concept of ‘Responsibility To Protect’ (R2P) by the 2005 World Summit. That is the reason why the African Union is usually referred to as a pioneer of the R2P.⁴¹ According to Ademola, no single international organisation had ever legally provided for humanitarian intervention in its treaty prior to the advent of the AU.⁴²

The other reason explaining the relevance of the African Union Law in the R2P discussion is the broadness of the triggering events it admits. In fact, the initial list made by the Constitutive Act-genocide, war crimes and crimes against humanity-has been expanded by the 2003 Maputo Amending Protocol to include ‘serious threats to legitimate order’. The phrase is believed to mean military coups or other attempts at overthrowing a legitimate government.⁴³ Attempts to mitigate absolute sovereignty in democracy-related matters have also materialized in the adoption of the

³⁸ Moller, B. ‘The African Union as a security actor: African solutions to African problems?’ Working Paper, Crisis States Research Center, LSE DESTIN (2009), www.eprints.lse.ac.uk at 20 August 2012.

³⁹ Constitutive Act of the African Union, Government of South Africa, http://www.au2002.gov.za/docs/key_oau/au_act.pdf at 21 August 2012.

⁴⁰ P. Williams, ‘From non-intervention to non-indifference: The Origins and development of the African Union’s security Culture’ *African Affairs* (2007).

⁴¹ E. Luck, ‘The United Nations and the Responsibility To Protect’, *Policy analysis brief* (2008).

⁴² Above n 34.

⁴³ Above n 40.

2007 African Charter on Democracy, Elections and Governance, which explicitly referred to the causal link between unconstitutional changes of government and insecurity, instability and violent conflict in Africa.⁴⁴

Including the fight against unconstitutional change in the R2P agenda is characteristic of the breadth of the new framework of the AU. It is worth mentioning that the AU is not actually (re)inventing the wheel in Africa. In 1990, the ECOWAS sent a force (ECOMOG) in Liberia with the mandate to restore law and order and create the necessary conditions for free and fair elections.⁴⁵ Involvement in obviously domestic politics is not anathema in African regional law and politics any longer. When compared with the heated debate about regime change as part of the 'global' R2P agenda, one can simply conclude that visionaries (or imperialists, as the case may be) are not always the ones usually labelled as such.

Although the letter of Article 4(4) clearly highlights that the AU has recognised the right to intervene in the above mentioned situations, the actual extent of that 'right' has been debated. The question is how much autonomy the Union has in the exercise of that 'right'. In other words, can the Union decide to use force without the authorisation of the Security Council? Or can it act and wait for an ex-post facto authorisation? Scholars like Ademola argue that the Union has just got the power to use political means.⁴⁶ This would perfectly fall in the peaceful mechanisms recognised by article 52 of the UN Charter. The author believes that the African Union founders did not actually want to grant the Union the power to autonomously use force. The argument is based, according to the author, on an analysis not only of Charter provisions but also on the history and political context of the reform. This view can be criticised in many respects. Its main weakness is its lack of realism. Stating that the 'revolution' wanted by the drafters of the Constitutive Act was limited to political and diplomatic interventions is to forget the aim of the R2P intervention: preventing or stopping war crimes, genocide, crimes against humanity and ethnic cleansing. It seems that a strategy totally excluding military action is not likely to achieve that goal. Whether military action without authorisation by the Security Council would still be lawful is another question. The African Union thoroughly looked at this issue during the Ezulwini conference.

⁴⁴ African Union, African Charter on Democracy, Elections and Governance at 21 August 2012.

⁴⁵ Above n 18.

⁴⁶ Above n 34.

b. The Ezulwini consensus: A “declaration of independence” from the Security Council?

In 2005, at Ezulwini in Swaziland, African states discussed about how to deal with the Security Council authorization in the implementation of R2P. They adopted a document that is still referred to as the ‘Ezulwini Consensus’.⁴⁷ The consensus states that the authorization for the use of force by the SC should be in line with the conditions and criteria proposed by the High Panel on Threats, Challenges and Change created by the UN Secretary at that time, Kofi Annan. The high-level panel had in fact identified five criteria or conditions which should guide the SC’s decision as to whether to authorise a military intervention or not. These are: seriousness of threat, proper purposes, last resort, proportionality, and balance of convenience. The Ezulwini Consensus agrees with those criteria but strongly states that their interpretation by the Security Council should not undermine the responsibility of the international community to protect civilian people at risk of the above mentioned crimes.⁴⁸ It can therefore be concluded that the African Union accepts the primacy of the Security Council for military operations, but only insofar as the Council behaves responsibly, which means, as stated above, in a way that doesn’t undermine the ability of the international community to discharge R2P.

However, the African Union has never had, even at Ezulwini, the illusion that the Security Council would ever apply these conditions in a manner that would guarantee that African lives would not be lost to the shenanigans of SC politics. Precedents of the SC’s extremely costly inaction in African conflicts, particularly during the 1994 Rwanda genocide, have left many Africans understandably disillusioned about leaving the implementation of R2P to the exclusive charge of the Security Council, especially with respect to the use of force to halt or avert humanitarian disasters. That is the reason why, as a precaution, the African Union decided at Ezulwini that, although it recognizes that the authorization from the Security Council is required for a military intervention to be legally valid, such approval could be granted *after the fact* in circumstances requiring urgent action.⁴⁹ The Union thus reserved for itself the right to act first and then seek retroactive approval as the situation might warrant. The signal given at Ezulwini is that the African Union does not regard Article 53(1) of the UN Charter, under which

⁴⁷ Document available at Responsibility to Protect, http://www.responsibilitytoprotect.org/index.php?option=com_content&view=article&id=34 at 21 August 2012.

⁴⁸ Above n 34.

⁴⁹ Ibid.

regional organisations are obligated to seek SC authorisation for their enforcement actions, to be always applicable. The legal and political question of Ezulwini was a kind of dilemma that the African Union decided to solve. According to Ademola, the choice was between leaving everything to the Security Council and risking doing nothing, and taking steps towards protecting human lives prior to worrying about compliance with legal obligations.⁵⁰ The African Union choose the latter.

Though the document of the Ezulwini Consensus does not mention it literarily, it can be assumed that the decision was based on the hope that the Security Council would retrospectively validate the interventions. However, from the perspective of an intervener, there is a kind of contradiction in recognising that the authorisation of the Security Council is required for the legality of the intervention while simultaneously stating that the authorisation can be granted afterwards, *après coup*. Does it not put the Security Council in front of a *fait accompli*? What if the authorisation is refused afterwards? In sum, for a regional organisation rooted in the good faith of its members, there is no practical difference between stating that authorisation can come afterwards and arguing that it is not required at all.

Article 4(h) of the Constitutive Act of the African Union and the Ezulwini Consensus, are clearly at odds with the letter of the article 53 of the UN Charter. A rigorous interpretation of the latter suggests in fact that the authorisation must be given prior to intervention. The question is whether they can still be lawful. Article 103 of the UN Charter stipulates that:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.⁵¹

Hakimi would give an affirmative answer to the above question.⁵² As previously highlighted, that author thinks that legality does not any more mean consistency with the Charter.

Levitt claims that Article 4(h) of the AU Constitutive Act and its interpretation by the Ezulwini Consensus do not actually violate article 103 UN Charter. That author bases his point on the fact that, acting under

⁵⁰ Ibid.

⁵¹ UN Charter, United Nations, <http://www.un.org/en/documents/charter/chapter16.shtml> at 21 August 2012.

⁵² Above n 5.

Chapter VII of the UN Charter, the UN Security Council has retrospectively authorized African Regional interventions taken under the authority of hardened regional customary law that has been modified into treaty. He specifically refers to operations undertaken by the ECOWAS in Sierra Leone. He therefore concludes that article 103 of the UN Charter seems to create an exception for African intervention treaties. According to him, it cannot be argued otherwise unless one accepts that the Security Council violated Article 103 in retrospectively authorizing the interventions he refers to – a difficult claim to make given the discretionary power of the Security Council in that matter.

Levitt's argument is fantastical from a formal point of view.⁵³ The problem with the reasoning is that the author does not take into consideration the fact that for the Security Council to grant an *ex post facto* authorization to an intervention, the 'regional law' in accordance to which the intervention was decided is indifferent. It is an 'internal affair' for the organization. Rather, what matters is whether, according to the provisions of the Charter and with regard to the facts of the situation, the Security Council would have allowed the intervention *ex ante*. If the Council deems it should have but did not do it because of its own shortcomings, then the *ex post facto* authorization is granted. The function of that authorization is then to validate an already legal intervention, as far as the substantial motives are concerned. On the contrary, if the Council deems that it would not have given the authorization, for instance because the grounds for intervention are missing, the fact that the intervention has already taken place in accordance to 'regional law' does not change anything. The intervention is declared illegal. This is the weakness of Levitt's argument. When the Security Council grants *ex post facto* authorisation to a military intervention undertaken by a regional organization, the authorization is not to be seen as declaring that the 'regional law' according to which the intervention was first decided is in conformity with the Charter. Neither does it guarantee that future similar interventions will be authorized. The power of the Security Council is discretionary and the discretion is exercised on a case by case basis.

Furthermore, a doctrinal trend suggest that since Article 103 is addressed to states and not to international organisations, and since the latter are not signatories to the UN Charter, their use of force without SC authorization

⁵³ Levitt, J. (2003). The Peace and Security Council of the African Union: The known unknowns. *Transnational Law and Contemporary problems*, 109, pp.109-137.

to implement R2P does not contravene Article 103.⁵⁴ The argument might look a bit hypocritical. It sounds as if it were possible for states to escape collectively from obligations that they individually assume under the UN Charter. As far as use of force is concerned, this cannot happen because the relevant provision here (Article 53) directly targets regional ‘arrangements or agencies’ and not individual states. The argument does however have some relevance. It recalls that there is no such a thing as a rigid hierarchy within the sources of international law. It therefore opens the door to customs that might contradict, at least slightly, the letter of the UN Charter.

The claim that regional organisations do have an independent power to use force is supported by political realities. One of them is the inaction of the Security Council. Kofi Annan, the former UN Secretary General once warned:

If the collective conscience of humanity ... cannot find in the United Nations its greatest tribune, there is a grave danger that it will look elsewhere for peace and for justice. If the Council – and the five permanent members in particular – fail to make the Council relevant to the critical issues of the day then they can only expect that the Council will diminish in significance, stature and authority.⁵⁵

The logic of the argument is that if the Security Council does not want regional organizations to use force, it can prevent them from doing so just by acting itself, taking Chapter VII measures. Ironically, the EZULWINI Consensus viewed the Security Council’s exclusive authority in exactly the same as the Responsibility to Protect doctrine looks at state sovereignty. For a state, sovereignty implies responsibility and, in this case, the willingness and ability to protect its citizens and inhabitants against genocide, crimes against humanity, war crimes and ethnic cleansing. Applying the same rule to the Security Council begs the following question: why should the Council always claim exclusive authority to authorize enforcement action even though it does not necessarily comply with its responsibility-to-protect duties? Just as a state that does not comply with its R2P duties forfeits all or part of its sovereignty, so should an exceedingly passive Security Council be obliged to bear other actors who intervene to protect individuals in danger.

⁵⁴ Above n 34.

⁵⁵ Press Release: Secretary-General Presents his Annual Report to the General Assembly, United Nations, <http://www.un.org/News/Press/docs/errors/99999999.sgs7136.html> at 21 August 2012.

A conservative counter-argument is that this contravenes spirit of the Charter with respect to the functioning of the Security Council. De Wet argues that we cannot demand the Council to justify why it is not adopting military measures. According to that author, in the case of enforcement action, the Charter system is based on an ‘opt in’ procedure, rather an ‘opt out’ one. This means that the Security Council only has to justify why it is engaging in military action and may not be forced into a situation where it has to justify its inaction. This is reflected by the five permanent members’ veto power.⁵⁶ That counter-argument is not convincing precisely because the doctrine introduces the notion of ‘Responsibility’. It is wrong to look at the Security Council only as a power holder. It is also a responsibility-bearer.

The misuse or abuse of the veto power by permanent members offers another source of legitimacy to attempts to override the exclusive authority of the Security Council. It is today deemed unconscionable that one veto can override the rest of humanity on matters of grave humanitarian concern. Of particular concern is the possibility that needed action will be held hostage to unrelated political interests of one or more of the permanent members.

During the consultations that led to the adoption of the R2P framework, a “code of conduct” for the use of the veto with respect to actions that are needed to stop or avert a significant humanitarian crisis was suggested. The idea essentially was that a permanent member, in matters where its vital national interests were not claimed to be involved, would not use its veto to obstruct the passage of what would otherwise be a majority resolution. The concept would have been similar to ‘constructive abstention’, an expression used in that context in the past. This was deemed to be the most pragmatic way to prevent the veto power from sabotaging entire R2P project.⁵⁷ The promoters of the idea knew that it was unrealistic to imagine any amendment of the Charter happening any time soon so far as the veto power and its distribution were concerned. The adoption by the permanent members of a more formal, mutually agreed practice to govern the R2P situations in the future would have been a very salutary development. During the 2005 Summit that led to the adoption of the World Summit Outcome Document which defined the R2P, it was suggested to include

⁵⁶ Above n 18.

⁵⁷ Andy W. Knight and Frazer Egerton, *Routledge Handbook of the Responsibility to Protect* (2012) 99-100.

that agreement in the final document, but the United States of America rejected the proposal.⁵⁸

Apart from its inaction, the Security Council is criticised for its unprincipled implementation of the global security system. This has a particular significance for Africa. The indignation of African States with entrusting the exclusive responsibility to protect peoples in the Security Council derives from a history of costly disappointments and betrayal at the hands of the notoriously selective priorities of the United Nations. Unprincipled application of collective security has prompted African states to openly defy some Security Council decisions. For instance, the Organisation of African Unity's Assembly of Heads of State and Government adopted the Ouagadougou decision, which mandated its members to disregard the SC sanctions imposed on Libya pursuant to the Lockerbie Affair.⁵⁹

It is also argued that the regional organisations' proximity to conflict areas adds to their legitimacy to intervene. At Ezulwini, the African heads of States and Governments thought it was imperative that Regional Organisations in areas close to conflicts, be empowered to take action since the General Assembly and the Security Council are often far from the scenes of conflicts and may not be in a position to appreciate fully the nature and development of conflict situations.⁶⁰

c. Smartly circumventing the Charter: Extending the definition of self-defense

Depending on the level of integration, states cede parts of their sovereignty and give relatively important powers to the regional organisations of which they are members. Ceding part of one's sovereignty is in itself a sovereign act. The Charter cannot forbid it, even if it concerns military action. In fact, the ECOWAS member states did it in 1999. To avoid possible controversy that might result from interventions similar to the one undertaken in Liberia a decade before; they adopted a protocol authorizing the ECOWAS to take enforcement actions in any member states without their consent. Since then, ECOWAS has applied the protocol on several occasions, including repelling Faure Eyadema's unconstitutional ascendancy to the Togolese presidency

⁵⁸ Above n 34.

⁵⁹ Ibid.

⁶⁰ Ibid.

after the death of his father, and imposing arms embargoes on Guinea and Niger in 2009.⁶¹

It can be argued that since consent is given in a treaty, the intervention cannot qualify as enforcement action. The argument does not survive scrutiny, though. It is worth keeping in mind the difference between consent given to a specific intervention and the one given once for all in a treaty. The latter does not alter the enforcement character of the operation.

As the above developments clearly show, the conflict between the United Nations Security Council and regional organizations turns mostly on the power to use force. However, conflict may also arise regarding the means of the intervention. In other words, the regional organization's approach might be peacefully to look for political solutions to the conflict while the Security Council thinks force is the only option. This is what happened in Libya between the African Union and the United Nations Security Council.

III. Conflicting approaches to protection

At the very beginning of the insurrection in Libya, before the incendiary declarations of Muhamar Kaddafi promising hell to the rebels, the African Union had established a high-level ad hoc committee on Libya. On March, 10, 2011, the Committee received a mandate articulated in mainly three points:

1. To engage with all the parties in Libya and continuously assess the evolution of the situation on the ground;
2. To facilitate an all inclusive dialogue between the Libyan parties on the appropriate reforms to be carried out; and
3. To engage AU's partners, in particular the League of Arab States (LAS), the Organisation of the Islamic Conference (OIC), the European Union (EU) and the United Nations, to facilitate Coordination of efforts and seek their support for the early resolution of the crisis.⁶²

The Committee immediately recognized the Libyan people's aspiration to democracy, political reform, justice, peace and security, as well as socio-economic development, and the need to ensure that these aspirations

⁶¹ Ibid.

⁶² Communique of the 265th Meeting of the Peace and Security Council (10 March 2011), Mathaba, <http://www.mathaba.net/news/?x=626177> at 21 August 2012.

are fulfilled in a peaceful and democratic manner.⁶³ It never supported any side openly. The African action it was calling for revolved around the following elements:

- i. the immediate cessation of all hostilities;
- ii. the cooperation of the concerned Libyan authorities to facilitate the diligent delivery of humanitarian assistance to the needy populations;
- iii. the protection of foreign nationals, including African migrant workers living in Libya; and
- iv. dialogue between the Libyan parties and the establishment of an inclusive transition period, with the view to adopting and implementing the political reforms necessary for the elimination of the causes of the current crisis, with due consideration for the legitimate aspirations of the Libyan people for democracy, political reform, justice, peace and security, as well as socio-economic development.⁶⁴

However, that agenda survived only on paper. The AU Committee flying to Tripoli to start contacts in view of the implementation of that roadmap was refused access to the Libyan territory by the NATO applying the UNSC Resolution 1973. Why did this happen? The ‘*no fly zone*’ component of the resolution cannot justify the decision because its logical targets were the Libyan military’s aircrafts and their possible supporters. The real reason is that the African Union’s political approach was in open conflict with the NATO and UN military strategy. When the Committee was allowed to go to Libya, it was too late. The NATO bombing had created a military context such that one side of the belligerents was no longer interested in negotiations.⁶⁵

The Libyan case exemplifies the fact that the statement according to which use of force is the last option is merely a theoretical one. It does not mean the same thing in practice for the UN as for the African Union. According

⁶³ Looking at the Libyan political landscape and practices of that time, it is not clear that peaceful political voices calling for change would have ever been heard. However, in calling for a peaceful political process, the African Union was simply and faithfully applying the Charter on Democracy and Good Governance to which Libya is a party. Above n 44.

⁶⁴ Press Release: Visit of the African Union High-Level ad hoc Committee on the situation in Libya to Tripoli, African Union (10 April 2011), http://www.au.int/en/sites/default/files/Communique%20Libya%20_eng_%2010.4.pdf at 21 August 2012.

⁶⁵ K. Apuuli, The Principle of ‘African solutions to African Problems’ under the spotlight: The African Union (AU) and the Libya Crisis.

to Thakur, the UN's eagerness to use force should not surprise. Basing his judgment on history, the author states that the United Nations was neither designed as nor expected to be a pacifist organisation. In fact, the origins of the World Organization lie in the anti-Nazi wartime military alliance among Britain, the United States and the Soviet Union.⁶⁶

Proud of its Kenyan experience with Kofi Annan during the 2008 post-elections violence (an episode still believed to be the first application of the Responsibility to Protect), the African Union had dreamed of achieving the same success in Libya: preventing the worst without using force. It did not happen like that. Whether the AU's proposed approach would have been the most effective one is another question. What the case simply highlights is that the conflict between approaches in the implementation of the Responsibility to Protect is likely to happen again. In such a situation, determining the organization whose word is the last requires much more than a literal reading of the Charter rule.

Conclusion

This article has looked at the relationship between the United Nations and regional organisations in the implementation of their Responsibility to Protect duties. Although it also discussed possible conflicts between the approaches to protection by the regional organisations and the United Nations, most of the focus was on power distribution with respect to enforcement actions. The article has highlighted that recent state practice has challenged the Charter rule that regional organisations can only get involved in enforcement action with Security Council authorisation. Based on an analysis of the practice of the Organisation of American States but also and mainly on the law and practice of the African Union and some other African sub-regional organisations like the ECOWAS, the article argued that the challenge to the exclusive power of the Security Council to authorise enforcement action started long before the emergence of the Responsibility To Protect as a policy or norm. The article has also highlighted that those challenges cannot be seen as violations of international law because they seem to be accepted, even by the Security Council itself. However, the paper refused to look at Charter rules as mere legal niceties. Instead, it has argued that the letter of the Charter no longer tells the whole story about the law of use of force. Then what?

⁶⁶ R. Thakur, 'Libya and the Responsibility to Protect: Between Opportunistic Humanitarianism and Value-Free Pragmatism', (2011) *Security Challenges* 13-25.

Though the United Nations Charter keeps its relevance, neglecting the internationally accepted practice of regional organisations is shortsighted. The former UN Secretary General characterised the Responsibility to Protect as ‘an evolving norm of International Law’.⁶⁷ Can the same not be said of the authority of regional organisations to *autonomously* conduct all their R2P duties, enforcement action included?

⁶⁷ Public Conference in the University of Ottawa on the tenth anniversary of the adoption of the Responsibility To Protect.

**Avances en la Jurisprudencia Internacional
en Violencia Sexual contra Mujeres en Conflictos Armados**

BALTASAR GARZÓN*

The article by Judge Garzon aims to make a comprehensive study on the regulation of sexual and gender crimes against women in armed conflict. He examines the current law and developments in the international regulation and regional systems of protection for women. The author also examines the roles of the European Court of Human rights and the Inter-American System of Human Rights Protection. The Judge makes a detailed analysis of the jurisprudence concerning the International Criminal Court for the Former Yugoslav, the International Criminal Court for Rwanda, Special Court of Sierra Leone and the preliminary actions taken by the International Criminal Court. In this context, Judge Garzon argues that violent crimes against women, including sexual assaults, in armed conflict are a violation of evolving *erga omnes* norms and, as such, should be recognized as crimes against humanity that can be prosecuted by the courts. Finally, the author makes a review of national legislation in Spain and Colombia. The article concludes by drawing attention to the progressive codification of the Gender Crimes in contemporary international law and the auspicious decisions in the courts in Cambodia and Colombia.

I. INTRODUCCIÓN

Como primera afirmación, se debe convenir en que las últimas décadas han supuesto un sustancial avance en materia del reconocimiento y efectividad de los derechos de la mujer, y específicamente aquellos que ven vulnerados mediante la violencia en el marco de los conflictos armados.

De conformidad a las estadísticas internacionales, por lo menos una de cada tres mujeres ha sido golpeada, forzada a tener relaciones sexuales, o maltratada de alguna manera en el curso de su vida. Esta cifra tiende a aumentar en el contexto de conflictos armados. <<**La violencia mundial contra las mujeres es ya otro holocausto**>> dijo Ayaan Hirsi Ali al

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comentar las cifras que se contenían en el Informe elaborado en 2004 por el Centro para el Control Democrático de la Fuerzas Armadas de Ginebra: **“Entre 113 y 200 millones de mujeres de todo el mundo están desaparecidas demográficamente”**

Contrariamente a dichas estadísticas, la referencia puntual a los crímenes de violencia sexual contra la mujer en el marco de la normatividad internacional ha sido escasa hasta hace muy poco tiempo. Pese a empezar a esbozarse desde mediados del siglo pasado, los derechos de la mujer en materia de igualdad, no discriminación, la prohibición de tratos crueles, a no sufrir agresiones sexuales, o a tener acceso a un recurso efectivo¹, han estado ausentes de las resoluciones de los Tribunales nacionales e internacionales. En el último supuesto, la jurisprudencia internacional deja clara la obligación de los Estados de perseguir los crímenes de violencia sexual. Sin embargo, no es hasta época reciente cuando su persecución se empieza a hacer efectiva en algunos ámbitos. Sólo cuando estos crímenes se persiguen como delitos dejan de tener carácter de daño colateral/inevitable y privado y, se asumen como una grave violación de derechos humanos, del derecho penal internacional y del derecho internacional humanitario.

Históricamente, en ninguna de las transcripciones de los juicios de Nuremberg, se incluyeron referencias a las violaciones, prostitución ni a ningún otro crimen sexual, y ni siquiera aparece la palabra mujer, a pesar de que los crímenes contra las mujeres fueron extensamente documentados. Tampoco la Carta de Londres que creó dicho tribunal, aparece referencia al delito de violación sexual. Por su parte, en los 429 artículos de las Convenciones de Ginebra del 1949, sólo una frase en el artículo 27 de la IV prohíbe la violación sexual y la prostitución forzada.

Más increíble aún, es que la Declaración sobre la Protección de Mujeres y Niños en Emergencias y Conflictos Armados de 1974, omite cualquier referencia explícita a la violencia sexual. En los Protocolos Adicionales a las Convenciones de Ginebra de 1977, que se negociaron con la idea de aclararlas y llenar algunos vacíos, sólo una frase en cada uno explícitamente protege contra la violencia sexual, el art. 76 del Protocolo I, que establece que **"Las mujeres**

¹ (art. 3 de la Declaración Universal de Derechos Humanos 1948, el artículo 2 del Pacto de Derechos Civiles y Políticos 1966, art. 3 del Pacto Internacional de Derechos Económicos, Sociales, y Culturales, 1976, art. 1 y 2 de la convención sobre la eliminación de todas las formas de Discriminación contra la Mujer, 1979, art.1 de la Convención contra la Tortura y otros Tratos o Penas Cruelles, Inhumanos o Degradantes 1984).

serán objeto de especial respeto y serán protegidas en particular contra la violación, la prostitución forzada y cualquier forma de ataque indecente." y el art. 4 del Protocolo II, que establece en el segundo párrafo, subpárrafo (e) que habla de "Los ultrajes a la dignidad personal, en particular el tratamiento humillante y degradante, la violación, la prostitución forzada y cualquier forma de ataque indecente.

El Estatuto del Tribunal Penal Internacional para la Antigua Yugoslavia menciona específicamente la violación como crimen de lesa humanidad de competencia de ese tribunal, más no como infracción de las leyes y costumbres de guerra. Es más, en las primeras acusaciones formales de este tribunal, no se incluyó ni siquiera el delito de violación sexual, a pesar de que el mundo entero había sido sacudido por los reportajes en la prensa de la limpieza étnica que se había practicado en esa república a través del embarazo forzado.².

La violencia sexual en escenarios de conflicto armado es uno de los ejemplos más reveladores acerca de cómo el uso de la violencia nunca es neutral al género de la víctima. Se utiliza de forma discriminatoria y haciendo uso de los estereotipos y significados de género para humillar, vencer y controlar al adversario y premiar y cohesionar a su tropa. Algunos de los crímenes de violencia sexual, por su naturaleza sólo se cometen contra las mujeres y niñas, como en los casos de aborto forzoso, el embarazo forzoso o la mutilación de los pechos.

En estos contextos, la violencia contra la mujer es altamente utilizada como herramienta de guerra.

Por medio del cuerpo de la mujer agredida sexualmente, se produce una agresión a la moral de los hombres con quienes la mujer agredida tiene relación de dependencia. En Congo, la destrucción del cuerpo de la mujer en la que se destruyen sus genitales, es una forma indirecta pero de eficacia extrema para destruir la moral del grupo tribal del que la mujer dependa.

Con anterioridad a la década de los años 90 la violación y otros delitos sexuales eran considerados como daños colaterales de las

² *Las mujeres y la Corte Penal Internacional Alda Facio* <http://www.uasb.edu.ec/padb/revista/1/analisis/aldafacio.htm>

guerras y conflictos armados o bien como atentados al honor de la familia, atentados al honor masculino u ofensas privadas.

Esta tendencia cambia a partir del trabajo realizado por los Tribunales Penales Internacionales para la ex-Yugoslavia y Ruanda, responsabilizando penalmente a los individuos por actos de violencia con base en género y de índole sexual, así como tras la inclusión de varias formas específicas de crímenes de género en el Estatuto de Roma. Asimismo, esta extensión de la implementación de la perspectiva de género en las jurisdicciones internacionales también abarca a los tribunales de carácter regional, como la Corte Inter-americana de Derechos Humanos (Women's link Worldwide. Crímenes de género en el derecho penal internacional. Guatemala. Agosto 2010).

II. TRATAMIENTO INTERNACIONAL DE LA VIOLENCIA DE GÉNERO.

La violencia contra la mujer en cualquiera de sus formas, se encuentra ampliamente reconocida por el derecho y la jurisprudencia internacional como una forma de discriminación con base al género. Se entiende que una de las causas principales de la violencia es la aplicación de estereotipos de género sobre las mujeres y que, además, la violencia menoscaba o anula la posibilidad para las mujeres de disfrutar y ejercer sus derechos y libertades fundamentales .

A/ La evolución normativa internacional sobre la violencia sexual en el marco de conflictos armados.

A partir de los años 90s, y gracias, entre otros factores, a las organizaciones defensoras de derechos de las mujeres se generó una proliferación de recomendaciones y la adopción de normas puntuales frente a la violencia sexual en el marco del conflicto armado, produciéndose una gran preocupación internacional por la utilización de los delitos sexuales como arma de guerra.

Así, la Recomendación General 19, formulada en 1992, el Comité para la Eliminación de la Discriminación contra la Mujer interpretó que el término “discriminación” utilizado en la Convención sobre la Eliminación de todas

las formas de Discriminación contra la Mujer (“CEDAW” en sus siglas en inglés) incluía la violencia de género:

la violencia dirigida contra la mujer porque es mujer o que la afecta en forma desproporcionada. Incluye actos que infligen daños o sufrimientos de índole física, mental o sexual, amenazas de cometer esos actos, coacción y otras formas de privación de la libertad. La violencia contra la mujer puede contravenir disposiciones de la Convención, sin tener en cuenta si hablan expresamente de la violencia) y la responsabilidad de los estados si no se adoptaban las medidas necesarias para impedir esos actos o para investigarlos y sancionarlos. Así mismo, se enfatizaba sobre

los peligros que corren las mujeres en caso de guerra o conflicto:

Las guerras, los conflictos armados y la ocupación de territorios conducen frecuentemente a un aumento de la prostitución, la trata de mujeres y actos de agresión sexual contra la mujer, que requiere la adopción de medidas protectoras y punitivas.

Por su parte, el preámbulo de la **Declaración de las Naciones Unidas sobre la Eliminación de la Violencia contra la Mujer**, formulada en 1994, se reconoce que la causa más profunda de la violencia contra la mujer es la subordinación de ésta en la sociedad:

la violencia contra la mujer constituye una manifestación de relaciones de poder históricamente desiguales entre el hombre y la mujer, que han conducido a la dominación de la mujer y a la discriminación en su contra por parte del hombre e impedido el adelanto pleno de la mujer, y que la violencia contra la mujer es uno de los mecanismos sociales fundamentales por los que se fuerza a la mujer a una situación de subordinación respecto del hombre) y se resalta la especial vulnerabilidad de determinados grupos de mujeres, “..como por ejemplo las mujeres pertenecientes a minorías, las mujeres indígenas, las refugiadas, las mujeres migrantes, las mujeres que habitan en comunidades rurales o remotas, las mujeres indigentes, las mujeres recluidas en instituciones o detenidas, las niñas, las mujeres con discapacidades, las ancianas y las **mujeres en situaciones de conflicto armado son particularmente vulnerables a la violencia**

En el artículo 4 se exhorta a los Estados a actuar:

Los Estados deben condenar la violencia contra la mujer y no invocar ninguna costumbre, tradición o consideración religiosa para eludir su obligación de procurar eliminarla

El Consejo de Seguridad de las Naciones Unidas ha abordado la violencia sexual ejercida contra las mujeres en situaciones de conflicto adoptando diversas resoluciones al respecto:

- En la **Resolución 1325**, adoptada en el año 2000, se pide a los Estados miembros que **incorporen una “perspectiva de género” y aumenten la participación en pie de igualdad de las mujeres en la “prevención y solución de los conflictos” y el “mantenimiento y el fomento de la paz y la seguridad”**. Se exhorta también a las partes implicadas en un conflicto armado a que cumplan las leyes internacionales que protegen los derechos de las mujeres y las niñas civiles e incorporen políticas y procedimientos que protejan a las mujeres de delitos de género como la violación y la agresión sexual.
- En la **Resolución 1820**, adoptada en 2008, se pide que **se ponga fin al uso de actos brutales de violencia sexual contra mujeres y niñas como táctica de guerra y a la impunidad de los responsables**. Se pide también a las Naciones Unidas y a su Secretario General que faciliten protección a las mujeres y a las niñas en las iniciativas dirigidas por la ONU sobre seguridad, incluidos los campos de refugiados, y que inviten a las mujeres a participar en todos los aspectos de los procesos de paz.
- En la **Resolución 1888**, adoptada en 2009, se detallan **medidas para aumentar la protección de mujeres y niñas frente a la violencia sexual en situaciones de conflicto**, como solicitar al Secretario General que nombre a un representante especial para coordinar las misiones, envíe a un equipo de expertos en el caso de situaciones que susciten una preocupación especial y ordene a las fuerzas de mantenimiento de la paz la protección de las mujeres y los niños.
- En la **Resolución 1889**, adoptada también en 2009, se reafirma lo expuesto en la Resolución 1325, **se condena la persistencia de la violencia sexual contra las mujeres en las situaciones de conflicto** y se insta a los Estados miembros de la ONU y a la sociedad civil a que tengan en cuenta la necesidad de **proteger y empoderar a las mujeres y a las niñas**, incluidas aquéllas vinculadas con grupos armados, en las actividades programáticas que se lleven a cabo después de un conflicto.

El ESTATUTO DE ROMA de 1998, incluye la violación sexual ya no como una ofensa contra el honor, como está en las Convenciones de

Ginebra, sino como un delito tan grave como la tortura, la esclavitud, etc y reconoce de forma explícita que la lista de crímenes sexuales no es cerrada. En el preámbulo se declara que todos los Estados tienen el deber de ejercer su jurisdicción penal sobre los responsables de delitos tipificados en el derecho internacional. En el artículo 6 del Estatuto de Roma, se incluye como crimen de genocidio, la agresión sexual y la imposición por la fuerza de la reproducción; en el artículo 7.1.g, se identifican la violación, la esclavitud sexual, la prostitución forzada, el embarazo forzado, la esterilización forzada o cualquier otra forma de violencia sexual de gravedad comparable como crímenes de lesa humanidad cuando se cometan como parte de un ataque generalizado o sistemático contra una población civil. En el artículo 8, estos actos se tipifican también como crímenes de guerr

TRATADOS REGIONALES

- En el artículo I de la **Declaración Americana de los Derechos y Deberes del Hombre**, formulada en 1948, se afirma que “[t]odo ser humano tiene derecho a la vida, a la libertad y a la seguridad de su persona”. En el artículo V se establece que “[t]oda persona tiene derecho a la protección de la Ley contra los ataques abusivos a su honra, a su reputación y a su vida privada y familiar”. En el artículo XVIII de la Declaración se afirma también que “[t]oda persona puede ocurrir a los tribunales para hacer valer sus derechos”.

- En el artículo 3 de la **Convención Interamericana para Prevenir, Sancionar y Erradicar la Violencia contra la Mujer (Convención de Belém do Pará)**, adoptada en 1994, se afirma que **toda mujer tiene “derecho a una vida libre de violencia, tanto en el ámbito público como en el privado”**. En el artículo 4.g se declara que **toda mujer tiene derecho “a un recurso sencillo y rápido ante los tribunales competentes, que la ampare contra actos que violen sus derechos [...]”**. Según el artículo 7, los Estados Partes deben ejercer la diligencia debida para prevenir, investigar y sancionar la violencia contra la mujer e “[...] incluir en su legislación interna normas penales, civiles y administrativas, así como las de otra naturaleza que sean necesarias para prevenir, sancionar y erradicar la violencia contra la mujer y adoptar las medidas administrativas apropiadas que sean del caso [...]”.

- En el artículo 3 del **Protocolo a la Carta Africana de Derechos Humanos y de los Pueblos Relativo a los Derechos de la Mujer en África** (en inglés) (Protocolo de Maputo), adoptado en 2003, se afirma:

Los Estados Partes adoptarán y aplicarán las medidas necesarias para **garantizar la protección del derecho de toda mujer a que se respete su dignidad, así como la protección de la mujer contra todas las formas de violencia, en particular la sexual y verbal.**

- En el artículo 4.a del **Protocolo de Maputo** se impone también a los Estados Partes la obligación de “**promulgar y aplicar leyes que prohíban todas las formas de violencia contra la mujer, incluidas las relaciones sexuales no deseadas o forzadas, ya tengan lugar en público o en privado [...]**”. En el artículo 11 se subraya la vulnerabilidad de las mujeres en las situaciones de conflicto armado, y se incluye el siguiente párrafo: Los Estados Partes se comprometen a **proteger a las mujeres solicitantes de asilo, refugiadas, retornadas y desplazadas internamente contra todas las formas de violencia, la violación y otras formas de explotación sexual** y a garantizar que tales actos se consideren crímenes de guerra, genocidio o crímenes de lesa humanidad y que sus autores sean llevados ante la justicia bajo la jurisdicción penal competente.

- En el apartado 4 de la **Declaración sobre la Eliminación de la Violencia contra la Mujer en la Región de la ASEAN**, formulada en 2004, los Estados Partes acordaron: Promulgar leyes para **prevenir la violencia contra la mujer** y, cuando sea necesario, reforzarlas o modificarlas; potenciar la protección, curación, recuperación y reintegración de las víctimas y supervivientes, por ejemplo, adoptando medidas para investigar, procesar, castigar y, en caso pertinente, rehabilitar a los perpetradores; e **impedir que las mujeres y las niñas que hayan estado sometidas a cualquier forma de violencia, ya sea en el hogar, el lugar de trabajo, la comunidad, la sociedad o bajo custodia, vuelvan a ser objeto de victimización [...]**

Es especialmente destacable para el caso colombiano, la **Convención Interamericana para Prevenir, Sancionar y Erradicar la Violencia contra la Mujer**, conocida como *Convención de Belém do Pará*. Esta convención -- que entró en vigor en 1995 y ha sido aplicada en innumerables ocasiones por la Corte Interamericana de Derechos Humanos-- tiene carácter vinculante por lo que los estados integrantes de la misma --entre ellos Colombia-- tienen la obligación de cumplir con sus disposiciones para prevenir, sancionar y erradicar la violencia contra las mujeres.

A la vez, la protección contra la discriminación basada en sexo, edad, etnia u otra condición está arraigada en el Derecho Internacional de los Derechos Humanos y tiene **carácter de *jus cogens***³. Señalar en este punto la Convención sobre la Eliminación de todas las formas de Discriminación contra la Mujer (“CEDAW” en sus siglas en inglés) y **especialmente la recomendación general número 12 del Comité para Eliminación de la Discriminación de la Mujer sobre la violencia sexual y la obligación de su erradicación**. Asimismo, el Derecho Internacional de los Derechos Humanos consolida la protección contra la violencia basada en género cometida durante los conflictos armados vía las resoluciones del Consejo de Seguridad y la Asamblea General⁴ y la interpretación de tratados a nivel internacional y regional. Los tribunales regionales y Comités de Naciones Unidas han adaptado la definición de violación asentada por los Tribunales Penales Internacionales⁵.

B/ LA PERSECUCIÓN DE LOS DELITOS DE VIOLENCIA DE GENERO EN EL DERECHO PENAL INTERNACIONAL.

Durante el tiempo en que se mantuvo el conflicto armado en Ruanda, aproximadamente 500.000 mujeres fueron torturadas, violadas, mutiladas y masacradas durante el conflicto de 1994.⁶ Por su parte en Bosnia-

³ Ver: CEDAW. *Recomendación General número 19*. 1992. <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm-sp.htm#recom19>

CORTE IDH. *Caso González y otras (“Campo Algodonero”) vs. México*. 16 de noviembre de 2009. http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_esp.pdf

⁴ Resoluciones del Consejo de Seguridad: 1325 de octubre 31 del 2000, 1822 de 30 de junio de 2008, 1888 de 30 de septiembre de 2009, 1960 de 16 de diciembre de 2010. (Ver DOCUMENTO ADJUNTO 1)

Resolución de la Asamblea General: 61/438.

Plataforma de Acción de Beijing de 1995.

⁵ Ver, por ejemplo: Corte IDH. *Caso Rosendo Cantú y otra vs. México*. 15 de mayo de 2011. http://www.corteidh.or.cr/docs/casos/articulos/seriec_225_esp.pdf

Corte IDH. *Caso Fernández Ortega y otros vs. México*. 30 de agosto de 2010. http://www.corteidh.or.cr/docs/casos/articulos/seriec_215_esp.pdf

⁶Informe de la Relatora Especial sobre la violencia contra la mujer, sus causas y consecuencias, Sra. Radhika Coomaraswamy, Naciones Unidas. Comisión de Derechos Humanos, 55º período de sesiones. Integración de los derechos de la mujer y la perspectiva de género: la violencia contra la mujer preparado de conformidad con la Resolución 1997/44 de la Comisión de Derechos Humanos. E/CN.4/1999/68/Add.4. 21 de enero de 1999.

Herzegovina, se calcula en más de 60.000 las mujeres y niñas violadas por soldados, policías de forma organizada y sistemática⁷.

El Consejo de Seguridad de Naciones Unidas, creó en 1993 y 1994, los tribunales para la Ex Yugoslavia y Ruanda, respectivamente. Por primera vez es tratada la violación como delito de lesa humanidad. A través de sus pronunciamientos, estos tribunales sentaron los precedentes en materia de tipificación y sanción de estos crímenes.

La jurisprudencia internacional sobre violencia sexual a partir de las resoluciones de estos Tribunales y del Tribunal Especial para Sierra Leona han dejado establecido que la violación y las agresiones sexuales pueden constituir en sí mismas genocidio, crimen de lesa humanidad, crimen de guerra y tortura. Así mismo, establece que la violación es un elemento de otros crímenes como la esclavitud sexual y la prostitución forzada.

El genocidio y los crímenes de lesa humanidad poseen el estatus de *ius cogens* e imponen a los Estados obligaciones o deberes no derogables: *obligatio erga omnes*. La violencia basada en género puede constituir el *actus reus* (*hecho que justifica*) del delito de genocidio o de crímenes de lesa humanidad y por tanto su persecución y reparación es obligatoria en el derecho penal internacional.

La evolución del crimen de violación en la jurisprudencia internacional

El **crimen de violación**, fue el primero en ser reconocido como crimen de lesa humanidad, genocidio o crimen de guerra por la jurisprudencia internacional.

En la actualidad, podemos afirmar que bajo el Derecho Penal Internacional y el Derecho Internacional Humanitario, la prohibición de **la violación y la violencia sexual tienen estatus de derecho internacional consuetudinario**. En la misma línea, en el ámbito del Derecho Internacional de los Derechos Humanos, los tribunales regionales y Comités de Naciones Unidas han adaptado la definición de violación asentada por los Tribunales Penales Internacionales.

⁷ Informe del Secretario General Naciones Unidas 1996, Agresión y violación de mujeres en las zonas de conflicto armado de la ex Yugoslavia. Citado por Roxana Arroyo Vargas y Lola Valladares Tayupanta en Informe Violencia Sexual contra las mujeres. Serie Documentos Jurídicos Año 1.

La interpretación del crimen de violación ha evolucionado gracias a la jurisprudencia de los Tribunales Penales Internacionales para la ex Yugoslavia y Ruanda, que ha sido posteriormente considerada por el Tribunal Especial para Sierra Leona y la Corte Penal Internacional (CPI). En el caso de los Tribunales Penales Internacionales para la ex-Yugoslavia y Ruanda, **dicha evolución ha girado principalmente en torno a dos elementos constitutivos del crimen de violación, a saber, la penetración y el consentimiento.**

Con anterioridad, se entendía que existía violación cuando se producía penetración vaginal de la víctima, sin su consentimiento, con el pene del agresor.

Estos tribunales han ampliado el concepto de penetración y han establecido en qué casos podemos considerar *per se* que no existe consentimiento de la víctima.

Respecto a la penetración, fue el Tribunal Penal Internacional para Ruanda (TPIR), el que presentó en el caso *Akayesu* una definición de violación novedosa al ampliar, por un lado, los actos de violación a cualquier tipo de penetración corporal, y a la vez a cualquier tipo de invasión corporal no consentida con cualquier tipo de objeto.

Así, en su decisión, el Tribunal explica que “la violación es una invasión física de naturaleza sexual, cometida sobre una persona bajo circunstancias que son coactivas [...] La violación sexual no está limitada a la invasión física del cuerpo humano y puede incluir actos que no suponen penetración o siquiera contacto físico”. Esta definición fue posteriormente asumida por el Tribunal Penal Internacional para la ex-Yugoslavia (TPIY) en el denominado caso Celebici. No obstante, este Tribunal dio una nueva definición de violación en el caso *Furundzija*, donde estableció que los elementos objetivos del crimen de violación son: “i. Penetración sexual, incluso leve: a) de la vagina o ano de la víctima por el pene del perpetrador u otro objeto utilizado por el perpetrador; o b) de la boca de la víctima por el pene del perpetrador; ii. Bajo coerción o fuerza o amenaza contra la víctima o una tercera persona”. Este nuevo pronunciamiento generó un amplio debate en torno a la interpretación del crimen de violación, que fue finalmente abordado en la decisión del caso *Musema*, donde el TPIR analizó las dos definiciones dadas hasta el momento, y determinó que la definición del caso *Akayesu* era preferible a la recogida en el caso *Furundzija*, porque aquella comprendía todas las conductas definidas en esta última.

A pesar de ello, la discusión volvió a surgir con el pronunciamiento del caso Kunarac et al., donde el TPIY adoptó nuevamente la definición del caso Furundzija, pero añadió un nuevo asunto al debate, al analizar la interpretación del consentimiento en los casos de violación sexual. Así, el Tribunal determinó que para que no exista violación, el “[c]onsentimiento debe ser dado voluntariamente, como resultado de la libre voluntad de la víctima evaluada en el contexto de las circunstancias existentes.”

“El mens rea es la intención de efectuar la penetración sexual, y el conocimiento de que ello ocurre sin el consentimiento de la víctima”. La Sala de Apelación que estudió el recurso interpuesto en el caso Kunarac estuvo de acuerdo con esta definición, y además matizó que “hay factores ‘más allá de la fuerza’ que podrían dar lugar a un acto de penetración sexual no consensual o no voluntario por parte de la víctima. Un enfoque reducido sobre la fuerza o la amenaza de fuerza podría permitir a los perpetradores eludir responsabilidad por la actividad sexual a la que la otra parte no ha consentido por tomar ventaja de las circunstancias coercitivas sin depender de la fuerza física”. La Sala fue más allá y señaló que las circunstancias que daban lugar a los cargos de violación como crímenes de lesa humanidad o crímenes de guerra “serán casi universalmente coercitivas”, de manera que “el verdadero consentimiento no sería posible”.

Finalmente, el consenso respecto de la definición de violación llegó con la sentencia del caso Muhimana, donde el TPIR señaló que “la definición de Akayesu y los elementos dados en Kunarac no son incompatibles o sustancialmente diferentes en su aplicación. Mientras que Akayesu se refería en términos generales a una ‘invasión física de naturaleza sexual’, Kunarac se centró en articular los parámetros que debería reunir una invasión física de naturaleza sexual para que constituyera violación”.

En el caso Kunarac, además de lo dicho deben resaltarse algunos elementos importantes del fallo: se establece que “las formas de penetración sexual forzada infringidas sobre las mujeres con el propósito de interrogar, castigar o ejercer coerción **constituyen tortura** que el acceso sexual a las mujeres ejercido como el derecho de propiedad constituye una forma de esclavitud bajo los crímenes de lesa humanidad”⁸.

⁸ Viseur-Seller, Patricia: Gender-Based Persecution, United Nations, Expert Group Meeting on Gender-based Persecution, Toronto, Canada 9-12 Nov, 1997. EGM/GBP/1977.3. 6 de noviembre de 1997.

Frente a la **esclavitud**, la Sala de apelaciones estableció que la esclavitud tiene lugar a través de la explotación sexual de las mujeres y niñas. Considera que para que se configure la misma se deben tener en cuenta factores como "control del movimiento de alguien, el control del ambiente físico, el control psicológico, las medidas tomadas para prevenir el escape, la fuerza, la amenaza, la coerción, la duración, la afirmación de exclusividad, la sujeción al tratamiento cruel y al abuso, el control de la sexualidad y el trabajo forzado⁹.

En cuanto al **consentimiento en la esclavitud**, la Sala de Apelaciones aceptó que la falta de consentimiento no era un elemento del crimen que el Fiscal debía probar, porque la esclavitud se basa en el ejercicio del derecho de propiedad y consideraron que en tales circunstancias, era imposible expresar el consentimiento, por lo que era suficiente presumir la ausencia de tal¹⁰.

En cuanto a la **tortura**, la Sala de Apelaciones consideró que está constituida por un acto o una omisión que da lugar a dolor o sufrimientos graves, ya sean físicos o mentales, pero no existen otros requisitos específicos que permitan una clasificación exhaustiva o una enumeración de los actos que podrían constituir tortura¹¹. Previamente la Sala de juicio había desechado el argumento de los apelantes que plantearon que el sufrimiento debía ser visible, porque consideraron que algunos actos establecen *per sé* el sufrimiento de las víctimas, y la violación es uno de ellos. La Sala fue más allá y tuvo por probado el sufrimiento aún sin un certificado médico, estableciendo que la violencia sexual daba lugar a dolor o sufrimientos graves, ya sean físicos o mentales. Es decir, una vez que se prueba la violación, se tiene por probado el sufrimiento o dolor severo de la tortura, porque la violación lleva implícito dicho dolor o sufrimiento¹².

Caso Cestic

En este caso el acusado, Ranko Cestic fue investigado por varios cargos entre los que estaba el "asalto sexual" de 2 musulmanes detenidos. Durante el proceso, el acusado aceptó los cargos y fue condenado por el tribunal por crímenes de lesa humanidad por forzar intencionalmente a 2 hermanos musulmanes a realizar sexo oral entre ellos mientras eran observados por

⁹ Sentencia Sala de Apelaciones. Párrafo 119

¹⁰ Idem. Párrafo 120

¹¹ Idem. Párrafo 129

¹² Sentencia de la Sala de Juicio, párrafo 205. En:

http://www.rnw.nl/informarn/html/act010222_tpicasofoca.html

otros soldados. Consideró el tribunal que ese tipo de acciones constituye un acto degradante y humillante, contrario al derecho internacional humanitario.

El tribunal valoró la acción como agravada teniendo en cuenta el impacto que las mismas causan a las víctimas y sus familiares al mismo tiempo por haber sido cometidos frente a terceros lo que incrementa la humillación de las víctimas.

Caso Tadic

Miembros de las fuerzas serbo-bosnias que actuaban en el municipio de Prijedor, fue declarado culpable por la Comisión de crímenes de lesa humanidad y crímenes de guerra perpetrados durante 1992. No fue condenado directamente por cometer acto de agresión sexual pero si de participar en una campaña de terror generalizada y sistemática mediante acciones como golpizas, tortura y agresiones sexuales. Pese a que en la acusación original se incluyó el delito de violencia sexual, fue retirado posteriormente debido a que la víctima se negó a declarar.

La sentencia afirma categóricamente que

la violación y el abuso sexual pueden considerarse como parte de una campaña generalizada o sistemática de terror contra la población civil. No es necesario probar que la violación misma fuera generalizada o sistemática sino que la violación constituía uno o tal vez muchos tipos de crímenes, cuyo espectro se cometía de forma generalizada o sistemática e incluía una campaña de terror por parte del agresor

Por su parte, el **Tribunal Especial para Sierra Leona (TESL)** en el caso *Prosecutor vs. Issa Hassan Sesay, Morris Kallon y Augustine Gbao*, conocido como caso *RUF*, considera que **existe violación cuando el acusado invade el cuerpo de otra persona mediante cualquier conducta que resulte en la penetración, por mínima que sea, de cualquier parte del cuerpo de la víctima, utilizando su órgano sexual o penetrando el ano o genitales de la víctima con cualquier objeto o cualquier parte de su cuerpo, siempre que la invasión haya sido el resultado del uso de la fuerza o la coacción.** El Tribunal considera que el uso de la fuerza o su amenaza se producen de tal manera que la víctima sufre un temor a la violencia, la agresividad, la detención, la opresión psicológica o un temor por el abuso de poder, contra ella misma o alguna otra persona, o aprovechando un ambiente de coacción.

Asimismo, en el **Estatuto de Roma** se señala que el consentimiento no podrá inferirse de ninguna palabra o conducta de la víctima cuando la fuerza, la amenaza de fuerza, la coacción o el aprovechamiento de un entorno coercitivo hayan disminuido su capacidad para dar un consentimiento voluntario y libre y tampoco cuando la víctima sea incapaz de dar un consentimiento libre. También en el Estatuto del TESL se señala que no podrá entenderse que existe consentimiento cuando la víctima se mantiene en silencio o no pone resistencia a la violencia sexual, y matiza que “la credibilidad, la honorabilidad o la disponibilidad sexual de la víctima o de un testigo no podrán inferirse de la naturaleza sexual del comportamiento anterior o posterior de la víctima o testigo”.

Como podemos observar, las definiciones de violación dadas por el TESL y la Corte Penal derivan de las definiciones emanadas de los Tribunales *ad hoc*. Igualmente, las consideraciones en torno al consentimiento son fruto de la evolución de la jurisprudencia de los Tribunales para la ex-Yugoslavia y Ruanda.

En la actualidad, **la violación y las agresiones sexuales pueden constituir en sí mismas genocidio, crimen de lesa humanidad, crimen de guerra y tortura**. Igualmente, **la violación es un elemento de otros crímenes como la esclavitud sexual y la prostitución forzada**.

C/ Corte Penal Internacional.

Los primeros casos de investigación sobre violencia sexual en el marco de la CPI se han desarrollado frente a la situación de la República Democrática del Congo. Los informes allegados a la Corte se centran en torturas, desplazamiento forzado, reclutamiento de menores y violaciones sexuales. Naciones Unidas estimó que más de 40.000 mujeres y niñas fueron violadas. El caso más avanzado corresponde a la investigación contra Germain Katanga “Simba” y Mathieu Ngudjolo chui,

dos líderes guerrilleros de la República Democrática de Congo, acusados de reclutar niños soldado, así como de asesinato, violación y de haber forzado a las mujeres al esclavismo sexual. Su caso es el segundo en llegar a la Corte, y se centra en lo ocurrido en 2003 en Bororo, un pueblo de la región de Ituri, al noreste del país. Según la fiscalía, Katanga y Chui lanzaron allí conjuntamente a sus tropas contra los habitantes y mataron a 200 vecinos. Luego se llevaron al

menos a 15 menores para combatir en sus filas. Muchas de las víctimas fueron mutiladas con machetes mientras las mujeres eran violentadas.

Katanga, alias Simba, era el jefe de la Fuerza Patriótica de Resistencia. Perteneció a la etnia lendu, de tradición agrícola, y enfrentada a los hema, dedicada al pastoreo. Chui, también de la comunidad lendu, comandaba el Frente Nacional Integracionista. Luis Moreno Ocampo, fiscal jefe de la CPI, asegura que el conflicto de Ituri, zona rica en oro, "forma parte de la guerra civil que arrasó Congo tras el genocidio perpetrado en la vecina Ruanda en 1994". Después de revisar casi 17.000 documentos, la acusación llamará a 26 testigos. De estos, 21 declararán ocultando su identidad por temor a represalias. Antes de la apertura del proceso, Katanga se mostró "confiado en la imparcialidad" del mismo. En cuando a Chui, se considera "una víctima más"¹³.

La decisión de confirmación de cargos se dio en septiembre de 2008, y el caso se encuentra en etapa de juicio desde el 24 de noviembre de 2009.

La defensa ha alegado que se está adelantando la investigación por los mismos hechos por en el orden interno por lo cual se debería respetar el principio de complementariedad.

En la decisión de confirmación de cargos por mayoría se encontró suficiente evidencia para confirmar los cargos de crímenes de guerra y de lesa humanidad frente a las acusaciones por violación y esclavitud sexual ocurridas el 24 de febrero de 2003 durante la toma de la ciudad de Bogoro, de forma consciente y conjunta, en el marco de un ataque sistemático y generalizado contra la población civil. En este contexto, la decisión de confirmación de cargos, junto con la decisión de confirmación de cargos en el caso Lubanga son las dos únicas decisiones de carácter sustantivo emitidas hasta el momento por la Corte. En la misma, se abordan por primera vez los elementos contextuales de los delitos de lesa humanidad previstos en el Estatuto de Roma (ER) y en los Elementos de Crímenes (EC), así como los elementos específicos de ciertos delitos de violencia sexual (violación y esclavitud sexual) tipificados en el ER como crímenes de guerra o de lesa humanidad.

Sin embargo en el caso Lubanga, no se ha producido condena por este tipo de delito, a pesar de que lo solicitaba el Fiscal.

¹³ http://www.agenciacna.com/2/nota_1.php?noticia_id=27976

D/ JURISDICCIONES REGIONALES

A. Sistema Interamericano de Derechos Humanos.

El Sistema interamericano de Derechos Humanos también ha generado avances importantes a través de las decisiones de la Comisión y la jurisprudencia de la Corte. En primer lugar la Comisión Interamericana entre 1991 y el año 2000 había identificado ya 14 casos relacionados con derechos sexuales y reproductivos, de los cuales 6 involucraba el uso de la violencia sexual como tortura por parte del Estado. Por su parte la Corte Interamericana ha establecido la responsabilidad de los Estados en casos de esterilización forzada, violencia intra familiar, y tortura con base en la violación sexual.

En lo que respecta a la **Comisión Interamericana**, también han sido **objeto de desarrollo**, los delitos sexuales y la justicia de género, en forma paralela al desarrollo jurisprudencial referido.

Dicha Comisión, se pronunció, respecto de la violación sexual, en dos Informes: el *Informe sobre Haití de 1995*: donde sostuvo que los **actos de violencia contra las mujeres califican como delitos de lesa humanidad cuando son utilizados como arma para infundir terror** y el *Informe s/Perú de 1996*: en donde, luego de definir la **violación sexual como “todo acto de abuso físico y mental perpetrado como acto de violencia”**, lo calificó como forma del delito de tortura.

Paralelamente la **Corte Interamericana de DDHH** cuenta a la fecha con dos pronunciamientos relevantes sobre violencia de género y delitos sexuales: “*Castro Castro c. Perú*” (2006) y “*Campo Algodonero c. México*” (2009).

La perspectiva de género se introduce por primera vez en la jurisprudencia de la Corte IDH a través de la sentencia de fondo emitida en la causa “Castro Castro”.

La Corte IDH, en el caso citado considera demostrado que durante los conflictos armados internos e internacionales las partes que se enfrentan utilizan la violencia sexual contra las mujeres como un medio de castigo y represión. La utilización del poder estatal para violar los derechos de las mujeres en un conflicto interno además de afectarles a ellas en forma directa puede tener como objetivo causar un efecto en al sociedad a través de esas violaciones o dar un mensaje o lección.

La Corte afirma en sus razonamientos jurídicos (apartado 206) que las mujeres privadas de libertad en el penal Castro Castro

...además de recibir un trato violatorio de su dignidad personal, también fueron víctimas de violencia sexual, ya que estuvieron desnudas y cubiertas con tan solo una sábana, estando rodeadas de hombres armados, quienes aparentemente eran miembros de las fuerzas de seguridad del Estado. Lo que califica este tratamiento de violencia sexual es que las mujeres fueron constantemente observadas por hombres.

La Corte, siguiendo la línea de la jurisprudencia internacional y tomando en cuenta lo dispuesto en la Convención para Prevenir, Sancionar y Erradicar la Violencia contra la Mujer (Belén do Para), consideró que “la violencia sexual se configura con acciones de naturaleza sexual que se cometen en una persona sin su consentimiento, que además de comprender la invasión física del cuerpo humano, pueden incluir actos que no involucren penetración o incluso contacto físico alguno”.

Así mismo, la Corte reconoce (apartado 311)

que la violación sexual de una detenida por un agente del Estado es un acto especialmente grave y reprobable, tomando en cuenta la vulnerabilidad de la víctima y el abuso de poder que despliega el agente. Asimismo, la violación sexual es una experiencia sumamente traumática que puede tener severas consecuencias y causa gran daño físico y psicológico que deja a la víctima “humillada física y emocionalmente”, situación difícilmente superable por el paso del tiempo, a diferencia de lo que acontece en otras experiencias traumáticas

Paralelamente, en la causa “Campo Algodonero” la Corte IDH avanza sobre los conceptos vertidos en el precedente citado y establece la responsabilidad del Estado por “haber permanecido indiferente frente a una situación crónica de violencia... ante la existencia de una cultura de discriminación contra la mujer”. Para la Corte IDH el Estado es responsable por los actos cometidos por particulares atento su condición de garante respecto del riesgo de violencia basada en género: teoría del riesgo creado (art. 7 de la Convención de Belén do Pará).

A la luz de los antecedentes citados, puede concluirse que la jurisprudencia internacional e interamericana se presenta como un punto de inflexión en el desarrollo de los delitos sexuales como delitos de lesa humanidad, advirtiéndose sólo algunas disidencias al momento de precisar su

tipificación: algunos fallos u opiniones postularon su condición de delito de lesa humanidad autónomo, y otros lo valoraron como una forma del delito de tortura.

E/ CASOS CONCRETOS RESUMIDOS EN EL ESPACIO INTERAMERICANO

1. Caso Fernando y Raquel Mejía vs Perú

Se acusa en el presente caso al Estado Peruano por los hechos ocurridos en junio de 1989 cuando un grupo de militares irrumpió en la residencia de Fernando Mejía Egocheaga y su esposa Raquel Martín; a él se lo llevaron y su esposa fue objeto de violación en 2 oportunidades.

El señor Fernando Mejía fue encontrado muerto 2 días después con signos de tortura, y la señora fue objeto de amenazas e intimidación, que la obligaron a salir del país.

En el caso de la violación, la Comisión Interamericana de Derechos Humanos determinó que se habían cumplido los elementos constitutivos de la tortura establecidos por la Comisión Interamericana para Prevenir y Sancionar la Tortura (Un acto cometido intencionalmente para infringir sufrimientos físicos o mentales, con el fin de castigar o intimidar, y cometido por un funcionario público o instigado por el.), considerándose el abuso sexual como un ultraje deliberado. Estableció que se violan los derechos a la integridad personal (art.5), y al honor y dignidad (art. 11) de la Convención Americana de Derechos Humanos.

2. Caso Dianna Ortiz v. Guatemala

Dianna Ortiz, era una mujer monja quien denunció haber sido secuestrada y torturada por agentes del Gobierno de Guatemala en 1989. En varias ocasiones fue violada por múltiples agentes y fue objeto de tortura mediante amenazas, y lesiones como quemada por cigarrillo.

En este caso la Comisión determinó que el trato inhumano que sufrió la Hermana Ortiz en manos de agentes del Gobierno corresponde a la definición de tortura al infringir sufrimiento físico y mental para castigarla e intimidarla por su participación en ciertas actividades y por su asociación con ciertas personas y grupos. Los agentes del Gobierno fueron responsables de las violaciones de derechos de la Hermana Ortiz, quienes actuaban al amparo de su capacidad oficial. El secuestro y la tortura de la Hermana Ortiz corresponden a una pauta de actividades cometidas por el Gobierno de Guatemala en violación a los Derechos Humanos.

La comisión concluyó que el Estado de Guatemala es responsable por violaciones de los Derechos Humanos de Dianna Ortiz a la integridad personal, a la libertad personal, a las garantías judiciales, a gozar de protección para la honra y la dignidad, a la libertad de conciencia y de religión, a la libertad de asociación y a la protección judicial, todos consagrados en los artículos 5, 7, 8, 11, 12, 16 y 25 de la Convención Americana y ha omitido cumplir con la obligación establecida en el artículo 1.

3. Caso Ana, Beatriz y Celia González Pérez v. México

Las hermanas Ana, Beatriz, y Celia González Pérez y su madre Delia Pérez de González fueron detenidas en 1994 por agentes estatales para ser interrogadas. Una de las víctimas era menor de edad. Por dos horas fueron detenidas, golpeadas y violadas en varias ocasiones por militares. Se denuncia también la violación al deber de investigar por parte del Estado, la falta de castigo a los responsables y de reparación a las víctimas.

Al respecto La Comisión reitera la configuración de tortura en casos de violación y determinó que:

La violación sexual cometida por miembros de las fuerzas de seguridad de un Estado contra integrantes de la población civil constituye en todos los casos una grave violación de los Derechos Humanos protegidos en los artículos 5 y 11 de la Convención Americana, así como de normas de Derecho Internacional Humanitario. Recuerda además que la Convención Interamericana para Prevenir, Sancionar y Erradicar la Violencia contra la Mujer garantiza a toda mujer el derecho a una vida libre de violencia.

La Comisión Interamericana considera que los abusos contra la integridad física, psíquica y moral de las tres hermanas Tzeltales cometidos por los agentes del Estado mexicano constituyen tortura y configuran una violación de la vida privada de las cuatro mujeres y de su familia y un ataque ilegal a su honra o reputación, que las llevó a huir de su comunidad en medio del temor, la vergüenza y humillación.

Según la jurisprudencia internacional de Derechos Humanos, en ciertas circunstancias, la angustia y el sufrimiento impuestos a los familiares directos de las víctimas de violaciones graves de Derechos

Humanos configuran adicionalmente una violación del derecho a la integridad personal de aquellos.

En el presente caso, la CIDH estima que el trato que se dio a la madre de las víctimas, Delia Pérez de González, quien tuvo que asistir impotente a la vejación de sus tres hijas por integrantes de las fuerzas armadas mexicanas y luego compartir con ellas el ostracismo de su comunidad, constituye una humillación y degradación violatoria del derecho a la integridad personal que le garantiza la Convención Americana.

La Comisión concluyó que el Estado mexicano violó en perjuicio de la señora Delia Pérez de González y de sus hijas Ana, Beatriz y Celia González Pérez los siguientes derechos consagrados en la Convención Americana: derecho a la libertad personal (artículo 7); a la integridad personal y a la protección de la honra y de la dignidad (artículos 5 y 11); garantías judiciales y protección judicial (artículos 8 y 25). Respecto de Celia González Pérez, el artículo 19 de la Declaración de los Derechos del Niño y todos los artículos relacionados con la obligación general de respetar y garantizar los derechos, prevista en el artículo 1(1) de dicho instrumento internacional. La CIDH establece igualmente que el Estado mexicano es responsable por la violación del artículo 8 de la Convención Interamericana para Prevenir y Sancionar la Tortura.

De otra parte, La Corte Interamericana en sus fallos ha sentado jurisprudencia importante que puede considerarse un avance en la investigación y sanción de delitos sexuales a nivel internacional.

4. Caso Inés Fernández Ortega Vs. México

Este caso trata tiene como víctima a una mujer indígena, del pueblo Me'phaa (tlapaneco), que fue amenazada, golpeada y violada por tres miembros del Ejército Mexicano, en el estado de Guerrero el año 2002.

En 2004, después de una serie de irregularidades ante las autoridades mexicanas, el caso fue llevado ante la Comisión Interamericana de Derechos Humanos. En 2009, la Comisión presentó una demanda contra México ante la Corte Interamericana de Derechos Humanos, en la que reclamó diversas violaciones a los derechos humanos de Inés Fernández Ortega, su esposo y sus cinco hijos.

El 30 de agosto de 2010, México fue declarado responsable por la violación de los derechos humanos a la integridad personal, a la dignidad, a la vida

privada y a no ser objeto de injerencias arbitrarias en el domicilio, en contra de Inés Fernández Ortega. En términos de la Corte “Este Tribunal recuerda, como lo señala la Convención de Belém do Pará, que la violencia contra la mujer no sólo constituye una violación de los derechos humanos, sino que es “una ofensa a la dignidad humana y una manifestación de las relaciones de poder históricamente desiguales entre mujeres y hombres”, que “trasciende todos los sectores de la sociedad independientemente de su clase, raza o grupo étnico, nivel de ingresos, cultura, nivel educacional, edad o religión y afecta negativamente sus propias bases”...La Corte, siguiendo la jurisprudencia internacional y tomando en cuenta lo dispuesto en dicha Convención, ha considerado anteriormente que la violencia sexual se configura con acciones de naturaleza sexual que se cometen contra una persona sin su consentimiento, que además de comprender la invasión física del cuerpo humano, pueden incluir actos que no involucren penetración o incluso contacto físico alguno...En particular, la violación sexual constituye una forma paradigmática de violencia contra las mujeres cuyas consecuencias, incluso, trascienden a la persona de la víctima....

La Comisión señaló que la violación sexual cometida por miembros de las fuerzas de seguridad de un Estado contra integrantes de la población civil constituye una grave violación a los derechos humanos protegidos en los artículos 5 y 11 de la Convención Americana. En los casos de violación sexual contra mujeres indígenas, el dolor y la humillación se agrava por su condición de indígenas debido “al desconocimiento del idioma de sus agresores y de las demás autoridades intervinientes[, y] por el repudio de su comunidad como consecuencia de los hechos”.

La sentencia condena violaciones a los derechos humanos de su esposo y sus hijos, igualmente establece; que el estado mexicano deberá realizar reformas legislativas a la legislación militar, otorgar becas de estudios a los hijos de Fernández Ortega, pagar una compensación económica y brindar tratamiento médico y psicológico a las víctimas.

5. Caso Castro Castro vs. Perú (2006)

Este caso se refiere a la masacre desatada durante cuatro días que duró el llamado “Operativo Mudanza 1” en la prisión Castro Castro en el Perú. Los internos de los pabellones 1A y 4B vieron constantemente amenazadas sus vidas por la intensidad del ataque, que implicó el uso de armas de guerra y la participación de agentes de la policía, del ejército y de fuerzas especiales. Se

pudo identificar la muerte de 41 reclusos y muchos otros fueron sometidos a tratos crueles y degradantes.

La importancia de este caso radica en que se reconoce el efecto diferenciado que tuvo el accionar militar en las mujeres. Según lo expresa la Corte “la masacre fue inicialmente dirigida contra las aproximadamente 133 mujeres que se encontraban en el pabellón 1-A de la prisión Miguel Castro Castro, con el objeto de exterminarlas, convirtiéndose en blancos singularizados del ataque contra la prisión. Muchas de las internas fueron asesinadas a quemarropa.” La Corte también consideró que la desnudez forzada a la que fueron sometidas varias personas internas representaba una forma de violencia sexual y como tal una violación del derecho a la integridad personal.

6. Caso Campo Algodonero (2009)

La demanda se relaciona con la supuesta responsabilidad internacional del Estado por “la desaparición y ulterior muerte” de las jóvenes Claudia Ivette González, Esmeralda Herrera Monreal y Laura Berenice Ramos Monárrez, cuyos cuerpos fueron encontrados en un campo algodonero de Ciudad Juárez el día 6 de noviembre de 2001. Se responsabiliza al Estado por “la falta de medidas de protección a las víctimas, dos de las cuales eran menores de edad; la falta de prevención de estos crímenes, pese al pleno conocimiento de la existencia de un patrón de violencia de género que había dejado centenares de mujeres y niñas asesinadas; la falta de respuesta de las autoridades frente a la desaparición [...]; la falta de debida diligencia en la investigación de los asesinatos [...], así como la denegación de justicia y la falta de reparación adecuada.”

En este caso, la Corte determinó que la desaparición y posterior muerte de tres mujeres en el contexto de discriminación en Ciudad Juárez (mexico) constituía violencia contra la mujer, acudiendo a la Convención Americana de Derechos Humanos y a la Convención Belém do Para.

7. Caso Rosendo Cantú y otra Vs. México. (2010)

Los hechos de este caso se relacionan con la supuesta violación sexual de la indígena Me'phaa Valentina Rosendo Cantú, así como con la alegada falta de debida diligencia en la investigación y sanción de los responsables de los hechos; las alegadas consecuencias de los hechos del caso en la hija de la presunta víctima; la supuesta falta de reparación adecuada en favor de la

presunta víctima y sus familiares; la alegada la utilización del fuero militar para la investigación y juzgamiento de violaciones a los derechos humanos, y a las supuestas dificultades que enfrentan las personas indígenas, en particular las mujeres, para acceder a la justicia y a los servicios de salud. La Corte señaló que la violación sexual sufrida por la indígena representa una violación del derecho a la integridad personal, la dignidad personal y la vida privada.

El 8 nov 11 la Comisión Interamericana de Derechos Humanos (CIDH) admitió el caso de tortura sexual de 11 mujeres violadas durante los operativos policíacos del 3 y 4 de mayo de 2006, en Texcoco y San Salvador Atenco, Estado de México.

F/ SISTEMA EUROPEO DE DERECHOS HUMANOS

La Corte Europea de Derechos Humanos también ha determinado que la violación sexual puede constituir tortura, así se pronunció en el Caso Aydin vs. Turquía,

una joven de diecisiete años, que vivía con sus padres en una aldea en Turquía suroriental, de la cual ella nunca había salido. En 1985 se presentaron serios disturbios en esa parte del país entre las fuerzas de la seguridad y los miembros del Partido separatista Kurdo. Turquía denunció que a causa de esta situación habían muerto más de 4.000 civiles aproximadamente y un número similar de miembros de las fuerzas de seguridad.

En este contexto Aydin fue golpeada, y violada mientras a su padre y familiares los detuvieron ilegalmente. Cuando Aydin fue a reclamar por sus familiares, unos guardias la llevaron a un cuarto, la desnudaron y la pusieron en un neumático de carro y le hicieron girar. Luego le golpearon, le lanzaron agua fría a alta presión, le volvieron a vestir y con los ojos vendados fue conducida a un cuarto de interrogatorios, donde un individuo vestido de militar le arrancó las ropas y la violó.

Finalmente el caso llegó a conocimiento de la Corte Europea de Derechos Humanos, la misma que en sentencia pronunciada en Estrasburgo el 25 de septiembre de 1997, sostuvo que la Sra. Aydin había sido sometida a torturas, violada y maltratada mientras estaba detenida por las fuerzas de seguridad turcas, en contra del artículo 3 del Convenio.

En ese caso, el Tribunal consideró que la violación de una detenida por un funcionario del Estado era una forma especialmente grave y aborrecible de malos tratos, de carácter tan grave como para constituir tortura. Además, el Tribunal sostuvo que las autoridades turcas no habían llevado a cabo una investigación completa y eficaz de la denuncia de Aydin que no existían remedios eficaces para resolver su denuncia¹⁴.

La Corte determinó que la violación puede constituir tortura y expresó: (...)La violación de una persona detenida por un agente del Estado debe considerarse como una forma especialmente grave y aberrante de tratamiento cruel, dada la facilidad con la cual el agresor puede explotar la vulnerabilidad y el debilitamiento de la resistencia de su víctima. Además, la violación deja profundas huellas psicológicas en la víctima que no pasan con el tiempo como otras formas de violencia física y mental.”

La Corte concluyó que la acumulación de actos de violencia física y mental cometidos en contra de la recurrente, y el acto especialmente cruel de violación a que se vio sometida, son constitutivos del delito de tortura penado en el Artículo 3 de la Convención.

En estos términos concluyo la presente intervención resaltando que la responsabilidad de investigar, castigar y reparar los daños ocasionados corresponde a los Estados. La jurisdicción internacional es complementaria, por lo que se hace necesario, para evitar la impunidad de dichos crímenes fortalecer los sistemas judiciales y de atención nacionales que permita contrarrestar la impunidad frente a la cual han estado sometidos los hechos de violencia sexual en el marco de los conflictos armados.

G/ LA PERSECUCIÓN DE LOS DELITOS DE VIOLENCIA SEXUAL EN LOS TRIBUNALES NACIONALES.

Las jurisdicciones nacionales empiezan a tomar en cuenta los grandes avances de la jurisprudencia internacional (tanto del DPI como de los Derechos Humanos) en materia de violencia sexual y están conociendo de estos crímenes, creando nueva jurisprudencia, enriqueciendo la existente, todo esto con mira a ofrecer reparación a las víctimas. Algunos antecedentes se encuentran en el Juzgado Central de Instrucción n° 5 de la Audiencia

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<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/a193f67c546ae776c1256b730057a340?Opendocument>

Nacional de España en la investigación de los crímenes de la dictadura argentina y chilena en los caso seguidos por el juez Baltasar Garzón al amparo del principio de Jurisdicción Universal por crímenes de genocidio, torturas, terrorismo y crímenes contra la humanidad. Posteriormente, con más amplitud, deben destacarse varios casos en Argentina y uno más en España, que pueden servir al caso colombiano.

a) **En Argentina** se puede consultar, por ejemplo la sentencia en **el caso N° 2086 y su acumulada N° 2277 contra Gregorio Molina**¹⁵, en la que el tribunal en lo Criminal de Mar del Plata en julio de 2010, establece que, a nivel nacional, ha quedado acreditado en el Juicio a las Juntas y en los informes efectuados por la Comisión Interamericana de Derechos Humanos y la Comisión Nacional sobre la Desaparición de Personas que las violaciones sufridas por las mujeres que se encontraban en los centros clandestinos de detención no fueron sucesos aislados u ocasionales sino que constituyeron prácticas sistemáticas ejecutadas dentro del plan clandestino de represión y exterminio montado desde el Estado y dirigido por las Fuerzas Armadas.

Así mismo añade que, la jurisprudencia internacional es unánime al sostener que los delitos de violación y violencia sexual cometidos contra mujeres en época de guerra o conflicto interno en un país constituyen delitos de lesa humanidad.

En esta dirección se han pronunciado los Tribunales Internacionales, creados para Juzgar los crímenes cometidos en la ex Yugoslavia y Ruanda.

El Estatuto de Roma de la Corte Penal Internacional menciona específicamente la violación, la esclavitud sexual, la prostitución forzada y la esterilización forzosa, cuando se cometan en tiempo de guerra o conflicto armado, como crímenes contra la humanidad); **la Resolución en “Actuaciones Complementarias del Centro Clandestino de Detención ARSENALES MIGUEL DE AZCUÉNAGA sobre Secuestros y Desapariciones y conexos”**, el Tribunal, el 27-12-2010 en Tucumán **DECLARA** que los delitos de violación de domicilio, privación ilegítima de libertad con apremios y vejaciones, torturas, torturas seguidas de muerte, abuso deshonesto, violación sexual y homicidio investigados en la presente causa, se habrían perpetrado en el contexto de un ataque sistemático desde el Estado contra una parte substancial del grupo nacional argentino (grupos políticos, políticos militares, y grupos de personas involucradas con la lucha

¹⁵ Ver: DOCUMENTO ADJUNTO 2.

social sin pertenencia política partidaria) a los que se habría identificado como “enemigos” del pensamiento “occidental cristiano” (cfr. Apartado 5.8), lo que configuraría el contexto del **delito internacional de GENOCIDIO**. La violencia sexual acaecida durante la represión es descrita en los siguientes términos: “Durante la vigencia de las leyes de impunidad (1987/ 2004), solo se iniciaron acciones penales por el delito de sustracción y ocultamiento de menores y algunas pocas por apropiación de bienes. Los delitos sexuales denunciados por las víctimas en sus testimonios, no fueron objeto de acción penal habiendo permanecido invisibilizados hasta fechas recientes.

(Cfr. **Sentencia del Tribunal Oral de Santa Fe en la Causa “Barcos”** (n.43/08) donde se analiza el delito de violación sexual como una forma de del delito de tormento; Sentencia del **Tribunal Oral de Mar de Plata** en la causa “Molina” (n.2086/10) donde se considera probado que en el marco del plan sistemático de represión era habitual que las mujeres ilegítimamente detenidas en centros clandestinos fueran sometidas sexualmente por sus captores o guardianes , afirmando en consecuencia que los actos de violencia sexual no constituyeron hechos aislados ni ocasionales sino que formaron parte de practicas sistemáticas y generalizadas). – Tal situación fue debidamente advertida por el Comité para la Eliminación de la Discriminación contra la Mujer (CEDAW) quien recomendó al Estado argentino que adopte medidas proactivas para hacer públicos, enjuiciar y castigar los incidentes de violencia sexual perpetrados durante la pasada dictadura, en el marco de los juicios por crímenes de lesa humanidad, de conformidad con lo dispuesto en la Resolución 1820 / 2008 del Consejo de Seguridad y que se concedan reparaciones a las víctimas(observaciones finales, 46º Periodo de Sesiones del 12 al 30 de julio de 2010, punto 16).

Por su parte el auto de **procesamiento en el caso del Penal de Villa Urquiza**, de fecha 19-5-2011 establece la comisión de **Torturas agravadas por la condición de género, Violencia de género: Situación de las mujeres detenidas clandestinas durante la vigencia del terrorismo de estado Violación sexual y Abusos Sexuales, y, en particular analiza la** autoría mediata o indirecta, que aparece cuando el agente se vale de otro que actúa pero no comete el injusto sea porque actúa sin tipicidad objetiva, sin dolo, o justificadamente. En el marco de tales conceptos, Roxin elaboró la tesis de que existe otra forma de autoría donde el dominio del hecho se da por fuerza de un aparato organizado de poder, sosteniéndose en que los conceptos usuales no son aplicables cuando se trata de crímenes de estado,

de guerra y de organización en los que el determinador y el determinado cometen el mismo delito, siendo decisivo el carácter fungible del último, que puede ser cambiado a voluntad como si se tratara de un artefacto mecánico:

cuanto más alejado de la víctima y de la conducta lesiva esta el ejecutor, más cerca está entonces de los órganos ejecutivos de poder lo que le proporciona mayor dominio del hecho (Zaffaroni, Alagia, Slokar; Manual de Derecho Penal Parte General, Ediar, 2005, Capítulo 24)

Consecuentemente, conforme la teoría expuesta, para determinar si una persona actuó como autor mediato en virtud de dominio de la organización, es necesario demostrar que el imputado ejercía un cargo y cumplía funciones con capacidades decisorias dentro de la organización, y que en tal condición habría intervenido en los hechos delictivos en tanto estos habrían sido perpetrados

por fuerzas bajo su mando y control efectivo, o su autoridad y control efectivo, según sea el caso”, y su responsabilidad deviene “... en razón de no haber ejercido un control apropiado sobre esas fuerzas cuando: a) hubiere sabido o, en razón de las circunstancias del momento, hubiere debido saber, que las fuerzas estaban cometiendo esos crímenes o se proponían cometerlos; y b) no hubiere adoptado todas las medidas necesarias y razonables a su alcance para prevenir o reprimir su comisión o para poner el asunto en conocimiento de las autoridades competentes a los efectos de su investigación y enjuiciamiento (art. 28 del Estatuto de Roma).

Aplicado al caso que nos ocupa, puede afirmarse que los testigos/víctimas que declararon en autos son claros y coincidentes en afirmar que entre 1975 y 1983 habría funcionado en el Penal de Villa Urquiza un lugar de detención en el cual eran alojadas personas secuestradas por fuerzas de seguridad, por motivos políticos o por haber sido calificadas de “subversivas”, quienes habrían soportado un trato cruel, inhumano y degradante.

Dicho lugar de detención habría funcionado como un “centro clandestino de detención” administrado y vigilado principalmente por personal del Penal –guardiacárceles-, personal de la Policía de la Provincia, de Gendarmería y del Ejército, y en él se habrían infringido torturas físicas y psicológicas a los que se encontraban allí detenidos, y en algunos casos se habría decidido su muerte.

Para determinar la responsabilidad penal por autoría mediata, corresponde entonces indagar si, atento el cargo y la función que ejercían los imputados y al ámbito donde esta se desarrollaba, puede presumirse que habrían tenido intervención en la comisión de los comportamientos delictivos corroborados en autos, por haber ejercido el dominio sobre los mismos a través del *dominio de la organización*.

b) En España, en el reciente Auto del Juzgado Central de Instrucción núm. 1 de la Audiencia Nacional (D.P 331/1999) del 26 de junio de 2011, se sienta un precedente único al ser la primera vez que un tribunal nacional afirma que existe la obligación de investigar los crímenes de violencia sexual ocurridos durante el genocidio en Guatemala (1960- 1996).¹⁶ Es necesario destacar también los recientes esfuerzos hechos en Guatemala para investigar y perseguir estos crímenes.

III. CONCLUSIONES

La jurisprudencia internacional sobre violencia sexual desarrollada por los tribunales *ad hoc* de la ex-Yugoslavia y Ruanda, en aplicación del Derecho Penal Internacional, ha conducido a la actual codificación de estos graves crímenes internacionales en el Estatuto de Roma para la Corte Penal Internacional (CPI).¹⁷

A pesar de que la CPI aún no ha emitido ninguna sentencia sobre este tema, en la actualidad tiene investigaciones abiertas por los crímenes cometidos en la República Centroafricana, la República Democrática del Congo, la región de Darfur en Sudán y en Uganda. Estas investigaciones incluyen cargos por esclavitud sexual y violación como crímenes de lesa humanidad y crímenes de guerra.

Es de suponer que esta jurisprudencia, cuando exista, será de particular relevancia pero, mientras, su investigación supone un decidido mensaje sobre el compromiso internacional para con la sanción y persecución de la violencia sexual en conflicto armado. Más aún, los nuevos procedimientos implementados por la CPI para garantizar la participación de las víctimas,

¹⁶ Disponible en http://www.womenslinkworldwide.org/wlw/new.php?modo=detalle_proyectos&tp=proyectos&dc=22

¹⁷ Consultar: Artículo 7 del Estatuto de Roma. http://www.un.org/spanish/law/icc/statute/spanish/rome_statute%28s%29.pdf

también incorporados por las Cámaras Extraordinarias de Camboya, envían un mensaje sobre la necesidad de reparar a las víctimas.¹⁸

En suma, es evidente que, de acuerdo con la jurisprudencia internacional tanto en el ámbito del derecho penal internacional como de los derechos humanos, existe una obligación de investigar y enjuiciar los crímenes de naturaleza sexual. Así, es el turno ahora de los tribunales nacionales de fortalecer la mentada jurisprudencia en materia de género aplicándola y conociendo de estos crímenes a nivel doméstico. En Colombia, el hecho de que en el proceso de justicia y paz colombiano tan solo se haya pronunciado **una condena** por crímenes de género cometidos en el contexto del conflicto armado (por guerrilla, paramilitares, policía y militares). Esta carencia, después de 6 años, no tiene justificación. El Estado y la justicia colombiana deben afrontar este reto de manera prioritaria e inexcusable. Es una deuda con las mujeres y niñas colombianas que exigen una respuesta firme y decidida por parte de las Instituciones, especialmente la judicial, para hacer efectivo el derecho a la verdad, la justicia y la reparación.

IV. NOTAS: (Chile : informe 2005)

1. “El miedo a la vergüenza social por parte de los hombres, incluidos los jueces, impiden asumir y asimilar ese plus que comporta el desprecio y la humillación de la mujer”
2. “Se tenía derecho a la violación, como al cuerpo de la mujer en general; no había nada que constriñera o impidiera actuar contra la misma”. “Era lo lógico”
3. “La violencia de género, puede integrar el delito de genocidio (agresión sexual) si concurre el requisito del propósito de destruir total o parcialmente un grupo nacional, racial, étnico o religioso” (art. 6 ECPI).
4. “En Chile, fue sistemática la tortura mediante agresión sexual en todas las presas, por el hecho de ser mujer. La Comisión Nacional sobre prisión política y Tortura, emitió un informe en 2005 en el que se constataron 3.394 casos de violencia sexual, sin distinción de edades, durante el periodo de represión de la dictadura pinochetista.”

Bogotá a 13 de julio de 2012

¹⁸ SACOUTO, Susana. Victim participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: a feminist project? Ver: DOCUMENTO ADJUNTO 5.

REFLECTIONS ON A REVOLUTION
IN INTERNATIONAL LAW:

TRENDS AND THE SECOND BOUNCE OF THE BALL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FUTURE TRENDS: SHORT TERM V. LONG TERM

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

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

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

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

THE SECOND BOUNCE OF THE BALL

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

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

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

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

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

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

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

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

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