2009

An Appropriate Focus on War

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BOOK DISCUSSION FEATURING THE 2009 WINNER OF THE ASIL CERTIFICATE OF MERIT FOR CREATIVE SCHOLARSHIP—THE HISTORICAL FOUNDATIONS OF WORLD ORDER: THE TOWER AND THE ARENA, BY DOUGLAS M. JOHNSTON

This panel was convened at 1:00 pm, Thursday, March 26, by its moderator, Devashish Krishan of Baker Botts LLP, who introduced the panelists: David Bederman of Emory University School of Law; Tai-Heng Cheng of New York Law School; John Crook of George Washington University Law School; and Mary Ellen O'Connell of University of Notre Dame Law School.*

THE IDEA OF LAW

By Tai-Heng Cheng†

Comments on DOUGLAS M. JOHNSTON, THE HISTORICAL FOUNDATIONS OF WORLD ORDER, THE TOWER AND THE ARENA (2008)

This celebration of Douglas Johnston's magisterial opus, *The Historical Foundations of Word Order*, is particularly appropriate in light of the theme of this year's Annual Meeting, "International Law as Law." *The Historical Foundations* is an expansive sweep covering how international law has actually operated from prehistoric man to the present time, and across major civilizations. If past is prologue, *The Historical Foundations* is a codex to decipher what international law is, can be, and should be.

The Annual Meeting's formulation of "international law as law" may seem defensive, as it might suggest an attempt to assert that international law is something concrete: "law" as we may understand the term in other contexts, such as in domestic law before national courts.

Ironically, the conjunction of "law" with "international law" might achieve the opposite, and arguably more desirable, or at least more interesting, effect. If international law is law, but looks and functions quite differently than domestic law, perhaps it is not that international law needs to be more concrete, but that the idea of law itself needs to be broader than formalists might admit. To use an avian metaphor, if a long-known but little understood feathered creature neither looks like a duck, nor quacks like a duck, but ornithologists nevertheless categorize it as a duck, then the form taxon duck must include more than just the tasty fowl farmed in the Hudson Valley.

Through his survey of scholarship on international law, and his detailed analysis of international incidents, Johnston provides lenses through which we can observe international law more carefully. Lo and behold, not only is international law unlike Hudson Valley duck, it is not even a single type of duck. Johnston's lens brings into focus, in the distance, a flock of Mandarins, Muscovys, Ruddys, Combs, and Pouchards! All different; but all ducks.

Johnston documents how international law theory, in its seemingly interminable quest for self-definition, appears to have fragmented over time into a range of different approaches: formalism, realism, New Haven, transnational legal process, and so on. All different; but all designated as law by their respective proponents.

* Devashish Krishan, David Bederman, and John Crook did not submit remarks for the *Proceedings*.

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This fragmentation has been persistent. One reason for the longevity of disputes over theory may be that some scholars have attempted to argue that their respective theories most closely approximate epistemological truths about what law is. If law can be proven to be a system of primary rules derived from secondary rules and a rule of recognition, then it cannot, so the reasoning goes, also be a process to increase human dignity through global decision-making involving norms, authority, and control. But, I dare say, no scholar has yet proven the truth of a concept of law, if, indeed, such a truth exists.

Another reason for continuing disputes over what international law is may be disagreements over the purposes and venues of law. If law exists only to decide disputes in court, then it may be focused principally on legal rules and their application to facts, not political considerations and policy choices.

Yet, in international incident after incident, Johnston demonstrates that law does not operate in courts alone. In his taxonomy, law occurs in juridical, diplomatic, and societal contexts.

And, Johnston tells us, the purpose of law itself can change. A scholar working in the Tower may occupy himself with broad appraisals of how legal rules interact with politics and policy. He may also make recommendations to improve well-being. As a scholar, Johnston presents a theory *about* law, and not merely a theory *of* law.

A legal advisor involved in formulation and implementation of foreign policy in the Arena must concern himself or herself with not just legal rules. He or she must also be sensitive to policy and politics, although, as Johnston points out, finding the right balance can be tricky. At a dinner earlier this week with diplomats from several countries, a senior official proclaimed that the most useful legal advisors were those who could anticipate and accommodate policy concerns and national interests. He invented the term "legalish" to designate a legal advisor's formulations that help sell national interests and foreign policy to rather more formalistic counterparts across the Atlantic. And this was not necessarily a uniquely American view, for I have been careful to omit the nationality of that diplomat. In any event, an erstwhile antipodean envoy quickly chimed in that their legal advisors' job was also to mix policy with legalish.

The judge or arbitrator laboring to make a decision resolving a dispute before him must concern himself with something different. In a lighthearted breakfast meeting in New York yesterday morning, an eminent arbitrator provocatively asked, "When presented with all manner of documents purporting to identify the law, how does an arbitrator determine what the law is?" Not to be outdone, I retorted, "Perhaps the question should be reformulated: How does an arbitrator determine what *is* law?" This was a loaded question, of course. An adjudicator cannot do her job armed only with a theory about law. The adjudicator must also have a theory of law, in which legal rules—however identified—are applied to facts, and in which political and policy considerations may not be dispositive.

There are many narratives of incidents in Johnston's book that demonstrate not just how variable the idea of law can be, but also that different actors involved in an incident may each have a different idea of law and yet reach an outcome that is undoubtedly mediated by law. Let me share just one incident from the book, which involved Johnston himself, states, legal advisors, scholars, and ASIL.

In 1969, the American tanker the *S.S. Manhattan* boldly navigated through the Northwest Passage of the Artic to demonstrate its ice-breaking capabilities. To the Canadians, this passage constituted an unacceptable incursion into what they believed were their waters. Canada's response to the *Manhattan* incident involved several paradigms of law. Applying an operational paradigm, Canada passed the Artic Waters Pollution Act. This law asserted

jurisdiction over waters up to one hundred nautical miles off Canada's artic coastline, and it permitted the seizure and destruction of ships within those waters that were reasonably suspected of flouting technical restrictions contained in the Act. This was an act of domestic law, yet the political motivations, and indeed, effects, were to affect the international legal framework regulating artic activities.

Simultaneously, Canada also addressed its actions to a judicial paradigm. It withdrew its consent to the jurisdiction of the International Court of Justice (''ICJ''), which, according to the legal rules binding the ICJ, revoked the Court's contingent authority to hear challenges to Canada's actions.

The United States responded with legalish. It issued a protest stating that ''the United States does not recognize any exercise of coastal States jurisdiction over our vessels ... and does not recognize the right of any State unilaterally to [extend] its territorial sea.''

The battle soon shifted to another arena. In 1970, four Canadian scholars, including Johnston, descended from the Tower to prepare a manifesto defending Canada's actions. Two rode into the 1970 ASIL Annual Meeting and all but pinned the manifesto to the door of one of the early sessions. The scholars got the attention they wanted. Wolfgang Friedman, using formalist legalish, was provoked into a spirited criticism of Canada's unilateral action in apparent violation of international rules existing at that time. Myres McDougal, who was Johnston's mentor and, by his assessment, a ''Titan,'' defended Canada's actions using a policy-oriented paradigm. According to McDougal, Canada's act should be accommodated within a legal framework because it was environmentally sound. He deplored slavishly following form over substance.

Eventually, in a third arena, the United Nations Convention on the Law of the Sea (UNCLOS) III, Canada persuaded delegates to accept an ''Artic exception,'' as set out in Article 234, that codified Canada's legal right to regulate its ice-covered waters to prevent pollution. It is a shame that Johnston's book does not specify the extent to which McDougal and Friedman's exchange may have influenced UNCLOS negotiations; however, I would not be surprised if a diligent researcher were to find from UNCLOS and government documents that the debates at ASIL made their way back to the foreign ministries and were duly considered.

Critics may point out that this vignette does not necessarily demonstrate that law is anything beyond legal rules, and it certainly does not include politics and other tactical concerns. They may say that legal advisors are engaged in law and politics; and it would be inaccurate to describe all that they do as law. McDougal's policy-oriented approach may be a useful and intellectual rigorous theory about law; but, *sotto voce*, it is not law.

Yet, how we label what we do to resolve global conflicts is perhaps less important that what we actually do. If the role of scholars is to guide decision-making, the proof of the pudding is whether their guidance is useful to decision-makers, not whether it is correctly labeled as law if, indeed, that word has a fixed meaning.

In this regard, the title of Johnston's opus is instructive. He is concerned with the foundations of world order, and not necessarily with the foundations of international law. We may get into quaint debates about whether measures to promote world order are law, but surely what matters most is whether we actually secure world order.

Johnston has done the international community a great service by clarifying this perspective. By organizing a universe of information to show how international decisions are made, he has, in his gentle way, validated the ideas of his intellectual progenitors about the global process of decision-making. He has also raised important questions for the next generation

of scholars. If the idea of law is malleable, and one's legal paradigms may vary according to the role, task, and venue, are there any objective or normative principles to guide the seemingly subjective selection of a paradigm of law? We can all agree that human dignity and world order should be global values to which we aspire, but is there a method to objectively specify the content of these values? Johnston and his ideas will live on in next-generation scholarship that explores the fields of study opened up by *The Historical Foundations of World Order.*

AN APPROPRIATE FOCUS ON WAR

By Mary Ellen O'Connell[*]

Comments on DOUGLAS M. JOHNSTON, THE HISTORICAL FOUNDATIONS OF WORLD ORDER, THE TOWER AND THE ARENA (2008)

Douglas Johnston's history of international law makes an important contribution to our understanding of the field. We have too few histories of international law and are fortunate now to have this creative new addition.

I share with Professor Johnston an understanding that knowledge of history is essential to comprehending international law. My own sense of the importance of history stems from my undergraduate years at Northwestern University as a history major. While there, I had the opportunity to take a course with Richard W. Leopold on the history of American foreign policy. Leopold was a legendary teacher. He was also a biographer of Elihu Root, the founder of the American Society of International Law. I believe only Leopold and Philip Jessup wrote full-length biographies of Root. Leopold's knowledge of, and interest in, international law gave me an historical orientation toward the study of international law—Professor Leopold saw the impact of events on international law and of international law on events. Since college, I have associated understanding international law with understanding history and understanding history with understanding international law.

When I began to study international law in earnest in graduate school, I soon discovered Arthur Nussbaum's *Concise History of the Law of Nations.* Like Professor Johnston's book, Nussbaum's is written in an accessible, enjoyable style; it follows certain themes; and it examines these themes in the setting of various regions of the world. Nussbaum, like Johnston, includes many stories and comments on personalities. My favorite story in Nussbaum's book at the moment may well be the story about the note Benjamin Franklin wrote to a publisher in Holland thanking him for three copies of Vattel's *The Law of Nations.* Franklin remarks on how much a new state needs international law in order to assert its sovereignty and take its place in the world.

As helpful as it is, Nussbaum's history is only about three hundred pages, and it was published in 1954. Therefore, when I began to work on my own book, *The Power and Purpose of International Law,* in addition to Nussbaum, I turned to the five-volume history of international law by Verzijl and the one thousand-page volume by Grewe, translated into English by Michael Byers in 2000. Both are major works: they are comprehensive, well-ordered, and very useful. But I am happy to add *The Historical Foundations of World Order* to this collection of histories. It recaptures many of the fine qualities of Nussbaum's book in a more extensive and up-to-date volume.

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Johnston, like Nussbaum, pursues themes and personalities through major phases of world history. Johnston's book is also enjoyable to read. More than Nussbaum, he takes a creative approach to his subject and includes many surprising and unexpected points. As other panelists have pointed out, it is not an A-Z compilation, but makes its accessible style and broad focus similar to Nussbaum's. Johnston also has stories and a focus on personalities, but not necessarily the personalities who have gone down in history as the main movers of international law. For example, in chapter one, he discusses Joseph Avenol, the last Secretary-General of the League of Nations. I doubt that I had ever read anything about Avenol before Johnston's book and, yet, he was plainly influential in the demise of the League of Nations. Johnston quotes Avenol's biographer that Avenol was "the wrong man in the wrong place at the wrong time."[1] By contrast, Johnston comments on another personality not often discussed now in international law circles, Lester Pearson. From Johnston's description of his fellow Canadian, we can conclude that he was the right man in the right place at the right time.[2] Throughout the book, Johnston makes clear that personalities matter. I agree with him on this point and am grateful to have so many more portraits of international law personalities discussed in the book.

Johnston's book, of course, has other, more conventional, advantages over Nussbaum's book: it is three times the length and published fifty years later. Johnston pursues eleven models through many important topics of international law, including the environment, treaties, organization, and human rights. Nussbaum pursues really just two themes: theory and the use of force—topics which Johnston also includes. Indeed, of all the topics, he may follow the use of force topic most consistently. As that is also the area of my own research, the remainder of these remarks will be about the book's treatment of that topic.

Around the middle of the book, Johnston states:

> War-related issues absorbed most of the energies of international jurists of the early modern era, as of theologians and other scholars in the pre-modern era. The key questions were: in what circumstances, if any, was resort to war lawful or legitimate (*jus ad bellum*) and what legal or moral duties constrained the conduct of parties to hostilities (*jus in bello*)? These questions may seem familiar to most readers.
> The volume and prolixity of writings on these issues—arguably among the most fundamental in international law even today—are prominent features of the literature of the 17th century.[3]

I would agree that questions on the use of force remain among our most important, if not the most important, in international law. Johnston pursues the topic throughout the book, and it becomes one of the themes that ties the whole together. He might, however, have situated this topic and others as part of law generally, and not just as an aspect of international law. It may have been particularly helpful at our current moment in history to demonstrate that international law is part of law, not a different sort of animal than law. In all of law, the fundamental purpose is to subject force to the authority of the community, to resolve disputes peacefully and not through the imposition of brute force. I think Elisabeth Zoller expresses this well: how in all human communities, law develops to create a monopoly on the use of force in the community's authorities. It is true in the international community and is why Johnston is right to give such prominence to the topic in his long book.

[1] DOUGLAS M. JOHNSTON, THE HISTORICAL FOUNDATIONS OF WORLD ORDER, THE TOWER AND THE ARENA 83 (2008).

[2] *Id.* at 83-87.

[3] *Id.* at 397.

In general, I agree with his analysis of international law and the use of force. No doubt that is due in part to the fact that I share Johnston's basic philosophical orientation to the field: "Most ... ethicists and moralists seem to agree that the definitive expression of moral principle in world affairs today is international law."[4] I assume that Johnston agrees with these ethicists and moralists. I certainly agree, and that fact is why I am highly supportive of the international community's most important legal commitments, such as the prohibition on the use of force—because these are moral commitments. The United Nations Charter is clear that force is generally prohibited in international law, as Johnston explains. In 2005, at the World Summit in New York that brought to a conclusion a thorough review of the United Nations and the Charter, the international community re-stated and re-committed to the ban on the use of force. Those rules do not include any right of unilateral force for humanitarian or other ends if not in self-defense or with Security Council authorization. So, it was with disappointment that I read Professor Johnston's comment that in his view the move to "humanitarian intervention" by some states, especially with respect to the Kosovo Crisis of 1999, was a positive development. He writes that "many international lawyers have taken the position that 'humanitarian intervention' should now be considered a matter of legal obligation, rather than one of entitlement."[5]

He wrote these words before the World Summit, and I like to think he would have re-thought them after that show of support of the Charter. By 2005, we also had a clear understanding of the limited utility of major military force for re-engineering complex social and political situations that create conditions of human rights abuse. Given his honest discussion of the attempts throughout history to control force, his courage in discussing religious contribution to creating a peace order, and his optimism about what international law can accomplish, I think he would have thrown his support with the world, even if it meant rejecting a popular idea in Canadian human rights circles.

All of Douglas Johnston's work is thorough and honest. His many collections reveal these qualities. I have particularly relied on the natural law chapter by Verdross and Keck in *The Structure and Process of International Law*. It is one of the very few analyses of natural law and international law available anywhere in a fifty-year period.Of course, such thorough and honest work can be lengthy. We live in a world where people convey information in a tweet. The history of international law needs far more—it needs a treatment like Johnston's, which I call the anti-tweet.

[4] *Id.* at 3.
[5] *Id.* at 93.