

Background

No. 1961
August 18, 2006



Published by The Heritage Foundation

International Law and the Nation-State at the U.N.: A Guide for U.S. Policymakers

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Introduction

Americans have pretty much always felt entitled to make law for themselves. As Virginia royal governor Alexander Spotswood complained 60 years before the Declaration of Independence, “by their professions and actions they [the colonials] seem to allow no jurisdiction, civil or ecclesiastical, but what is established by laws of their own making.”¹ That position was vindicated by the Revolution and remained unchallenged in any serious way for two centuries. Today, however, there is an advanced and determined movement afoot that—through the mechanisms of international law and super-national institutions—does challenge the right of the United States to define its own legal obligations as an independent and sovereign nation-state.

The Founding Generation, of course, knew international law and recognized its importance in facilitating relations between states. They readily accepted that, as an independent sovereign, the United States was bound by international law to the same extent as were the other “powers of the earth.” This much was made clear by the Declaration of Independence itself, which explained why it had become “necessary for one people to dissolve the political bands which have connected them with another and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them.”

In 1776, international law was considered, philosophically at least, to be a species of Natural Law: the

Talking Points

- International law is fundamentally different, in its conception and application, from domestic law. It is not made by legislation, nor is there any inherent legislative authority in the “international community,” however that term may be defined.
- The United States cannot be legally bound to treaties that it has not ratified, and the President should avoid signing treaties that he does not believe will be approved by the Senate, since this may result in claims that the United States must avoid taking action that would defeat the treaty’s “object and purpose” even where it is not a treaty party.
- Sovereignty is not some abstract concept that can or should be redefined by an inchoate “international community.” It is the right of the American people, and of all peoples, to govern themselves in accordance with their own institutions and by their own consent. It is the basis of our right to make law for ourselves.

This paper, in its entirety, can be found at:
www.heritage.org/research/worldwidefreedom/bg1961.cfm
Produced by the Margaret Thatcher Center for Freedom

A Freedom Project Report

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002-4999
(202) 546-4400 • heritage.org

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“law of nations.” Such law could be discovered or discerned in the practice of states, but it could not be “made” in the manner of domestic or municipal legislation. Then, as now, there was no global body politic and no global legislature. Consequently, as was necessarily implied by the inherent equality of every independent state, no state or league of states had the right to establish the *legal* obligations of any other state. All were equally competent to determine and interpret international law for themselves. As a result, and in no small part because international law did not purport to govern any state’s internal affairs, American democracy flourished in this world despite being virtually alone in its republican institutions.

Global politics have, of course, been transformed many times since the United States declared its independence. In the post–World War II era, and especially since the Cold War ended, a widening swath of world opinion has come to view international law and institutions as inherently superior to national ones, as the very font of legal and political legitimacy, and as a proper and appropriate means of achieving change even within national borders. The following quotation, from a German Foreign Ministry description of the newly established International Criminal Court (ICC), perfectly captures these attitudes:

It is a monumental achievement in the field of international legal policy that individuals who have transgressed their obligations to the international community as a whole may be held responsible by an independent international judicial institution. The ICC thus symbolizes jurisdiction exercised on behalf of the community of nations.²

At the same time, it is also fair to say that, beyond a few academics and activists, most Americans do not look to international institutions or the “international community” for validation of their

government’s actions or their own. One might well ask, in response to the German Foreign Ministry, what is the “international community”? Does it, for example, include China’s Communist rulers or the Persian Gulf’s divine right monarchs? And what obligations, exactly, might Americans have to them? Law, in the United States, is made by our elected representatives, and the measure of its legitimacy is the United States Constitution.

As a result, of course, international law has never been treated as a rigid and imperative code of conduct by U.S. policymakers. This attitude toward international law transcends political ideology and party label. Nowhere was it better displayed than in an exchange between then Secretary of State Madeleine Albright and her British counterpart, Foreign Secretary Robin Cook, during the run-up to NATO’s 1999 intervention in Kosovo. As reported by Mrs. Albright’s spokesman James Rubin, when Cook explained that British lawyers objected to the use of military force against Serbia without U.N. approval, she replied simply “get new lawyers.”³

Mrs. Albright’s suggestion was perhaps undiplomatic, but it revealed a firm grasp of the essential genius of international law: It is a body of norms made by states for states, and its content and application are almost always open to honest dispute. Moreover, and most important of all, there is no global power or authority with the ultimate right to establish the meaning of international law for all. Every independent state has the legal right—and the obligation—to consider and interpret international law for itself. In other words, when questions are asked about the meaning and requirements of international law, the answers will probably, and properly, depend on who the lawyers are.

This does not mean that international law is illusory or that it can or should be ignored by states in the day-to-day exercise of power. It does mean, however, that international law is best viewed as a

1. Letter of Alexander Spotswood to the Lords Commissioners of Trade and Plantations, May 23, 1716, quoted in 2 Richard L. Morton, *Colonial Virginia: Westward Expansion and Prelude to Revolution 1710–1763*, 413 (Chapel Hill 1960).
2. For background on the ICC, see www.auswaertiges-amt.de/www/en/aussenpolitik/vn/voelkerrecht/istgh/hintergrund_html (last updated in June 2005).
3. James Rubin, “A Very Personal War,” *Financial Times*, Sept. 30, 2000, p. 9.

collection of behavioral norms—some arising from custom and some from express agreement, some more well-established and some less so—that it is in the interest of states to honor. As Chief Justice John Marshall explained in 1812 in describing one important aspect of international law:⁴

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented [to certain legal norms].

The key, of course, is consent. Ultimately, the binding nature of international law is a matter of the consent of sovereign states. They can interpret that law in accordance with their understanding and interests, they can attempt to change it, and they can choose to ignore it—so long as they are prepared to accept the very real political, economic, and even military consequences that may result. This is the essence of sovereignty, which itself is the basis and guarantor of self-government.

This paper is designed as a short guide to international law for American policymakers. The topic area is, of course, vast—even when the inquiry is limited to what is commonly known as “public international law” (the rules governing the conduct of states) rather than international trade relations. As a result, the scope of the material treated here is necessarily limited and selective. An effort has, however, been made to discuss the most important tenets of international law as it is today applicable to the United States and to identify the current controversies over this law’s interpretation and applica-

tion that most profoundly divide the United States from its European Allies. In fact, the understanding of how the world’s nations are, or should be, organized in their inter-relations and what role international law and judicial institutions should play in that great endeavor is one area where differences between the United States and Europe are growing rapidly and are likely to produce increasing future tension and diplomatic conflicts.

Definition of Terms

I. What Is International Law?

Perhaps the most important and vexing question about international law is whether or not it is “law” at all.⁵

Traditionally, international law existed as a collection of principles and practices—some based on custom and some based on treaties—that govern the interactions of sovereign states. As a theoretical matter, most commentators found the basis of this “law of nations” in some form of Natural Law. As noted by Emmerich de Vattel in the 18th century, “We must then apply to nations the rules of the law of nature, in order to discover what are their obligations, and what are their laws; consequently, the law of nations is originally no more than the law of nature applied to nations.”⁶

Whether the actual practitioners of statecraft ever took the “divine” or “natural” foundation of international law very seriously, at least after the emergence of the “Westphalian” state system in 1648, is debatable.⁷ Over time, most states have complied with these rules in accordance with their needs and interests, always keeping in mind that violations of accepted norms can carry significant consequences—up to and including war. However,

4. *The Schooner Exchange v. M’Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

5. For an excellent presentation of the arguments as to why international law is not “law,” see Robert H. Bork, “The Limits of International Law,” *The National Interest* (Winter 1989/90).

6. Emmerich de Vattel, *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* 3 (Luke White edition, Dublin 1792).

7. The “Westphalian” system refers to the 1648 Peace of Westphalia, which ended Europe’s Thirty Years War. As part of this general settlement, the Habsburg Holy Roman Emperor recognized the effective independence of various German states. It is a useful shorthand for the system of independent, sovereign, and legally equal states which characterize the global political organization—even though many of today’s states had emerged as independent entities long before 1648.

from the perspective of current debates about the nature and role of international law as an organizing principle, the most important characteristic of the traditional international legal system is that there was no regular means of judicial enforcement. All sovereign states are equal in law, and none can claim the right to adjudicate—in a definitive legal, as opposed to political, sense—the actions of another.⁸

Changing this state of affairs has been one of the most important goals of “progressives” and “internationalists” since before the First World War. In particular, throughout the 20th century—and especially after World War II—determined and sustained efforts were made to establish some form of international judicial system under which states would no longer be the ultimate arbiters of their own international legal obligations. These efforts, which can fairly be said to include the League of Nations (and its Permanent Court of International Justice), the United Nations’ International Court of Justice (ICJ), and the International Criminal Court (ICC), have always found favor with the United States at their inception but have always been rejected in the end. (The United States, of course, never joined the League, withdrew from the ICJ’s compulsory jurisdiction in 1986, and “de-signed” the ICC treaty in 2003.)

The reason is simple enough. A genuine system of international law, comparable to domestic legal systems in its reach and authority, would require a universally accepted institution entitled both to adjudicate the conduct of states and, by extension, their individual officials and citizens and to implement its judgments through compulsory process with or without consent of the states concerned. Such a universal authority, however, would be fundamentally at odds with the founding principles of the American Republic. It would require the American people to accept that there

is, in fact, a legal power that has legitimate authority over them but is not accountable to them for its actions.

Pending this revolution in American beliefs and principles, U.S. officials and diplomats should recall two basic points in their approach to international law:

- As an independent sovereign, the United States is fully entitled to interpret international law for itself. The views of international organizations, including the United Nations, other states, and non-governmental organizations (NGOs) may be informative, but they are not *legally* binding unless, and only to the extent that, the United States agrees to be bound.
- Any institution or individual invoking international law as the measure of U.S. policy choices is only expounding an opinion of what international law is or should be. That opinion may be well or poorly informed, but it is not and cannot be authoritative. There is no supreme international judicial body with the inherent right to interpret international law for states.

In short, the United States, like all other states, is bound by international law; but, like all other states, it is also entitled to interpret international law for itself. Whether the U.S. or any other state has been reasonable in its interpretation is ultimately a political determination.

II. Does the U.S. Constitution Acknowledge International Law?

Advocates of various international norms, real or imagined, are quick to assert that international law is part of American law and therefore binding on the United States government. This is true as far as it goes. There are, however, numerous caveats that must be taken into account in determining the extent to which international law considerations may, or must, inform American policymaking.

8. As Vattel noted, “Nations being free, independent and equal, and having a right to judge according to the dictates of conscience, of what is to be done in order to fulfil its duties; the effect of all this is, the producing, at least externally, and among men, a perfect equality of rights between nations, in the administration of their affairs, and the pursuit of their pretensions, without regard to the intrinsic justice of their conduct, of which others have no right to form a definitive judgment; so that what is permitted in one, is also permitted in the other, and they ought to be considered in human society as having an equal right.” Vattel, *supra* note 6, at 9.

At the outset, it is worth noting that this rule is a judge-made doctrine that does not actually appear in the Constitution's text.⁹ The Constitution does, of course, make treaties "the supreme Law of the Land," although not as a means of empowering the courts to oversee the formulation and execution of United States foreign policy. The entire text of the Supremacy Clause makes its purpose clear—the targets were the states and not the federal government:¹⁰

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

As Justice Joseph Story noted in his 1833 exposition of the Constitution:

It is notorious, that treaty stipulations (especially those of the treaty of peace of 1783) were grossly disregarded by the states under the confederation. They were deemed by the states, not as laws, but like requisitions, of mere moral obligation, and dependent upon the good will of the states for their execution.¹¹

The Supremacy Clause was designed to ensure that the United States spoke with one voice on the international level and that the states could not choose for themselves which federal treaties to honor and which to ignore.

Supreme law notwithstanding, however, treaties remain subject to the Constitution and to later federal action. Where there is a conflict between the Constitution and a treaty, the Constitution prevails.¹² Moreover, treaties can be applied directly by the courts only to the extent that they are "self-executing" (most are not) or have been the subject of implementing legislation.¹³ Finally, Congress can modify or eliminate a treaty's effect, at least as a matter of domestic law, by a later statute.¹⁴ American courts are bound to respect the plain meaning of such a law even if treaty partners claim that this would violate U.S. international obligations and the claim is accurate. In this regard, however, it should again be emphasized that such a claim may or may not be correct in any given case, since no other state, group of states, or international institution is entitled—absent specific U.S. consent—to interpret or adjudicate American international law obligations. A difference of opinion over the meaning of either a treaty or the requirements of custom does not automatically amount to a violation of international law by any of the parties involved.

In addition, treaties are subject to a number of presidential actions. The President is the "sole organ" of the United States in its external relations.¹⁵ Although a President can "make" a treaty only after obtaining the Senate's consent (by a two-thirds vote), he can terminate a treaty (in accordance with its terms), or abrogate the agreement entirely, on his own authority. Similarly, the President can—as a lesser power—suspend American performance under a particular agreement as one

9. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction.").

10. U.S. Const. Art. VI, cl. 2.

11. Joseph Story, *Commentaries on the Constitution of the United States* 686 (Carolina Academic Press ed. 1987) (introduction by Ronald D. Rotunda & John E. Nowak). See also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 716 (2004) ("The Continental Congress was hamstrung by its inability to 'cause infractions of treaties, or of the law of nations to be punished.'").

12. See *Reid v. Covert*, 354 U.S. 1 (1957); *De Geofrey v. Riggs*, 133 U.S. 258 (1890).

13. See *Hamdi v. Rumsfeld*, 316 F.3d 468-69 (4th Cir. 2003) (Courts find a treaty self-executing only if the instrument, as a whole, evinces the intent to create a private right of action), *vacated on other grounds*, 542 U.S. 507 (2004).

14. See *Breard v. Greene*, 523 U.S. 371 (1998). This does not, of course, necessarily affect the United States' international obligations.

15. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936).

means of achieving U.S. policy goals. Of course, all of these actions may be more or less controversial, depending on the circumstances.

In fact, arguments have occasionally been advanced that the President must obtain the consent of Congress—or at least the Senate—before fundamentally changing U.S. treaty obligations. However, these claims have not been successful, either with the executive branch or before the courts. The leading case is *Goldwater v. Carter*,¹⁶ where a group of Senators and members of the House of Representatives sued to prevent President Jimmy Carter's termination of the Mutual Defense Treaty of 1954 between the United States and the Republic of China (Taiwan). The United States Court of Appeals for the District of Columbia Circuit ruled that the President, as “the constitutional representative of the United States with respect to external affairs,” was within his constitutional authority to terminate this treaty.¹⁷ For its part, the Supreme Court never reached the merits of this question. It vacated the D.C. Circuit's opinion and ordered the original complaint dismissed—an act strongly suggesting that this and similar questions are not subject to judicial determination at all.¹⁸

Finally, although international law is generally considered to be part of American law, the United States, like other sovereign nations, can derogate from the accepted rules. And, like other aspects of the nation's foreign relations, the exercise of this authority falls—at least in the first instance—to the President. The Supreme Court's ruling in *The Paquete Habana* is not to the contrary, although claims are sometimes made that it is. That case involved the U.S. Navy's capture, during the Span-

ish–American War, of fishing boats in Cuba's coastal waters. The Supreme Court was called upon to determine whether these vessels were lawful captures and concluded that they were not. Citing generally accepted rules of international law suggesting that coastal fishermen were not to be molested by belligerent forces, the Court ruled that the boats were not lawful “prizes” of war. However, in doing so, it specifically noted that “where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.”¹⁹ The suggestion is clear that, had there been a formal decision by the President (or by Congress through appropriate legislation) to ignore the otherwise applicable international rule, the United States courts would have been bound by that decision.

III. How Is International Law “Made?”

International law is made by and through the actions of states. This is true both with respect to customary international law and, since a treaty's meaning and continued efficacy greatly depend upon how the parties interpret and apply its provisions in actual practice, with respect to conventional or treaty law. However, for the sake of clarity, these fundamental aspects of international law will be addressed separately.

Customary International Law. Customary international law grows out of more or less consistent state practice over time. There is no hard and fast rule on how general a practice must be to be considered customary or on how long it must be followed. However, the “failure of a significant number of important states to adopt a practice can prevent a principle from becoming general customary law

16. 617 F.2d 697 (D.C. Cir. 1979).

17. *Id.* at 705.

18. The courts do, of course, regularly interpret and apply treaties in the cases that come before them—so long as a treaty remains in force and assuming it created a private right of action so as to support a litigant's suit. Even in this context, however, it is well settled that the executive branch's interpretation of a treaty—even if not conclusive—is entitled to deference. See *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982) (“Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”). Moreover, the meaning of treaties between states where the United States is not a party also is considered to be a political question and non-justiciable in the United States courts. See *Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005) (interpretation of peace treaties between Japan and belligerents other than the United States non-justiciable political question).

19. 175 U.S. at 700 (emphasis added).

though it might become ‘particular customary law’ for the participating states.”²⁰ Moreover, a rule *cannot* be imposed on a state that has objected.²¹

In this connection, it also is important to note that what are sometimes called the “sources” of international law are, in fact, merely *evidence* of what the law may be. This includes such authorities as (1) the decisions of international courts and arbitral bodies, (2) the decisions of national courts ruling on international law questions, (3) the writings of international law commentators, and (4) the statements of governments.²² As the Supreme Court cautioned long ago with respect to the writings of jurists and commentators, “Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.”²³

Opinio Juris. *Opinio juris* is a critical element in transforming an international usage or practice into a binding norm of customary international law. Unfortunately, *opinio juris* can be as elusive as the Philosopher’s Stone. The full term is *opinio juris et necessitatis*, and it refers to a belief by states that the practice at issue is legally required. In other words, however longstanding and widespread a practice may be, it is binding only if states comply out of a sense of legal obligation. As explained by Ian Brownlie, “The sense of legal obligation, as opposed to motives of courtesy, fairness, or morality,” is “a necessary ingredient” in turning general usage into a legal requirement.²⁴

Derogation from International Law Rules. States can derogate from customary international law

rules and from treaty obligations.²⁵ Such derogations are considered to be different from a repudiation of the rule or treaty and must also be distinguished from differences of opinion over the actual requirements of international law or the proper interpretation of a treaty. A genuine derogation involves one or more states acknowledging the force and effect of a particular rule or provision but nevertheless departing from it in limited circumstances. As such, openly admitted derogation is relatively rare. Most often, derogations involve states agreeing (expressly or by implication) to depart from a general rule in their own dealings with one another. These states generally are not considered to have violated international law.

A state can also choose to derogate from an otherwise applicable requirement on its own account. Depending on the rule in issue, however, it will risk prompting a negative response from its treaty partners or from the community of nations at large. Whether such a state can be said to have violated international law by its derogation, however, is almost always debatable. This is a function of the manner in which international law is made—based on the actual practice of states. Determining whether a particular state has violated its international obligations or has merely set out to promote and establish a new and different rule (or treaty interpretation) that, in its view, may be superior requires augurs of exceptional ability. As a result, and as a practical matter, the question is very much a political one—ultimately resolved by whether or not other states follow the new rule.

20. *Restatement (Third) of the Foreign Relations Law of the United States* § 103 (1987).

21. This often is referred to as the rule of the “persistent objector.” However, it is unclear on what basis a rule can be imposed regardless of whether a state has persistently objected, so long as it has made clear its opposition at some point during the rule’s development.

22. See, generally, *Restatement (Third) of Foreign Relations Law*, *supra* note 20, § 103.

23. *The Paquete Habana*, 175 U.S. at 700. (The exceptions, of course, are the rulings of a court acting within its own recognized jurisdiction.)

24. Ian Brownlie, *Principles of Public International Law* 7 (4th ed. 1990).

25. As a result, certain treaties include specific provisions forbidding derogation from particularly important provisions. For example, Article 4(2) of the International Covenant on Civil and Political Rights states that certain of its provisions (largely dealing with critical human rights such as the right to life, due process, and freedom of conscience) are non-derogable. Whether this section, or similar provisions, are themselves subject to derogation is an open question.

Jus Cogens. There are, of course, certain rules of international law from which, it is said, no derogation is permissible. These are generally referred to as “*jus cogens*” or “peremptory norms of international law.” The application of either term to a particular rule or practice should sound alarm bells for any American diplomat, since the benefits of achieving *jus cogens* status for a preferred rule are substantial. In fact, the number of international norms that can honestly be characterized as *jus cogens*—based on long and consistent state practice—is small. Thus, the impermissibility of the oceanic slave trade is *jus cogens* not merely because it has been universally condemned, but also because the responsible maritime nations have, at least since the mid-19th century, acted seriously and effectively to suppress the activity under a generally acknowledged claim of right.

Moreover, like other aspects of international law, *jus cogens* is subject to the development of new norms. As one important commentator has explained, “They are rules of customary law which cannot be set aside by treaty or acquiescence but only by the formulation of a subsequent customary rule of contrary effect.”²⁶ In short, the doctrine of *jus cogens* is subject to being formed and reformed by the actual practice of states. As a result, a principle that is claimed to be *jus cogens* but is widely ignored is probably not a peremptory norm of international law—however important the policy it may support or detestable the practice it purports to forbid.

Treaties and Other International Agreements.

On the international level, any agreement between or among states can properly be described as a treaty. These instruments can be bilateral or multilateral and create binding legal obligations for the states that become parties to any particular agreement. Under international law, states are required to comply with their treaty obligations. The principle *pacta sunt servanda* (“keep your agreements”) is often identified as *jus cogens*, and with some justice. All things being equal, over time, states have recognized the importance of compliance with their

treaty obligations, and—in the absence of special circumstances—most at least attempt to do so. The unilateral abrogation of a treaty without sufficient legal cause is considered to be a violation of international law. Most recent treaties, however, contain a termination or withdrawal clause permitting a party to end its obligations by meeting a notice requirement.

Bilateral treaties are, of course, agreements between two states generally governing aspects of their relationship to one another. The interpretation and application of such treaties is a matter for the parties alone, although the agreement may well provide for a type of arbitration or adjudication in an international body—such as the ICJ—in case of dispute.

Multilateral treaties involve an agreement between more than two states, and these types of agreements have significantly increased in number and importance over the past century. They include such basic instruments as the United Nations Charter, the North Atlantic Treaty, and the Geneva Conventions, as well as a whole array of critical agreements governing all aspects of transnational commerce and relations. Examples of such agreements include the Vienna Convention on Consular Relations, the Convention for the Unification of Certain Rules Relating to International Transportation by Air (the “Warsaw Convention”), the agreements establishing the World Trade Organization, and the Berne Conventions for the Protection of Literary and Artistic Works.

Multilateral treaties usually establish a specific number of ratifications necessary before the agreement will go into effect among the parties (the Rome Statute of the International Criminal Court, for example, required 60 countries to ratify before it went into effect) and are often—although not always—open to accession by states that may wish to become parties at a later time. Like more recent bilateral treaties, multilateral treaties often provide for a formal mechanism—submission to the ICJ—for resolution of disagreements over the

26. See Brownlie, *supra* note 24, at 513. As Brownlie also notes, “more authority exists for the category of *jus cogens* than exists for its particular content.” *Id.* at 514–15.

treaty's interpretation. States may or may not accept these provisions upon ratification. It is important to note, however, that there is no general principle of international law suggesting that an interpretation favored by a significant number of state parties to an agreement, even if this involves a substantial majority or near unanimity, must be accepted by all parties.

Treaties Purporting to Codify International Law. An increasingly important "source" of international law is treaties that purport to "codify" customary international law. These instruments must be treated with extreme caution, since they are very often much less than they appear. The codification of international custom is, in any case, a speculative business. States are far more likely to agree on general principles than on detailed provisions. Moreover, and more to the point, states are often much more willing to state a rule as internationally binding than they are to apply it in practice.

Nevertheless, in certain areas, serious attempts have been made to reach agreement not merely on principles, but on the details. Prime examples here are the Vienna Convention on the Law of Treaties, the Law of the Sea Treaty, and the 1977 Protocol I Additional to the Geneva Conventions of August 12, 1949. All of these agreements indisputably include some provisions that are, or can legitimately be argued to be, customary international law. Significantly, however, the United States has not ratified any of these agreements, and it is not bound by them—except to the extent that their provisions restate binding customary norms.

In assessing the effect of these and similar documents on the United States, it is critical to keep in mind that the mere fact that some provisions of a treaty restate binding norms of customary international law does not mean that the entire document enjoys that status. Each provision must be judged independently to determine whether there is sufficient state practice (that is, actual observance based

on a sense of legal obligation and in relevant circumstances) to justify its identification as binding custom. Thus, although Geneva Protocol I Additional clearly restates certain customary rules, such as the rule against deliberately targeting civilians, it also includes many provisions that represent efforts to "move" the international law of armed conflict in a particular direction—specifically toward "privileging" guerrilla or irregular combatants. The United States rejected this treaty on that very account and cannot now be held to these provisions merely because other portions of Protocol I are binding custom.

Executive Agreements. Although all agreements between or among states can accurately be labeled "treaties" for international purposes, this is not the case with respect to American constitutional law. The President can make treaties for the United States only with the Senate's consent. However, he can also enter certain "executive agreements," which bind the United States internationally and also have the force and effect of law on the domestic level.²⁷ The full extent of the President's authority in this area is unclear, although executive agreements have generally been "of a routine character."²⁸

Pre-ratification Obligations: Article 18 of the Vienna Convention on the Law of Treaties. One of the more vexing issues arises because of the practice, engaged in by both Democrat and Republican Presidents, of signing international agreements that have little or no chance of approval by the Senate and therefore will never be ratified by the United States. There are many reasons for this practice—it may appear prudent at the time to exercise "leadership" on a particular issue, or it may be an effort to drive international law in the direction an Administration favors. Regrettably, this practice often leads to claims that the United States is bound by a treaty that it has not ratified, at least to the extent that it cannot take action to defeat the treaty's "object and purpose."

27. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981) ("prior cases of this Court have also recognized that the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate.").

28. *Restatement (Third) of Foreign Relations Law*, *supra* note 20, § 303, cmt. g.

This rule is drawn from Article 18 of the Vienna Convention on the Law of Treaties, which the United States has signed but has not ratified. Although it is often stated that the Vienna Convention “is largely a restatement of customary rules,”²⁹ emphasis must be placed in the word “largely.” Article 18 is, in fact, a rule characteristic of civil law legal systems.³⁰ Whether it can be applied to common law countries without express consent is debatable. Moreover, its application by American courts would raise significant constitutional issues, at least in any instance where the President’s own authority was insufficient to bind the United States to a particular obligation, since treaty obligations cannot be undertaken without the Senate’s consent.

In any case, in construing Article 18, it is important to note that the obligation it imposes is emphatically not to comply with the terms of a treaty before the instrument is ratified. Rather, it requires only that a signatory “refrain from acts which would defeat the object and purpose of a treaty”—suggesting that only actions deliberately calculated to undermine a state’s ability eventually to comply, including and especially any uniquely irreversible action,³¹ are forbidden. Nevertheless, the potential application of Article 18 must always be considered and is one very good reason why any responsible President should not sign agreements he does not expect to be able to ratify.

IV. How Is International Law Interpreted and Enforced?

As states are the ultimate authors of international law, they also are the arbiters of its meaning. As suggested above, each nation, as an independent sovereign, has an equal right to interpret international law in general and its own international legal obligations in particular. The interpretation of one state—or group of states—is no better or worse

than the interpretation of others. This does not, of course, mean that states can interpret international norms to a point where any actual obligation is illusory. They must act, especially in construing their treaty obligations, in good faith.³² Moreover, all states must understand and accept that their interpretation of international legal requirements may carry consequences. As a legal matter, however, there is no state, group of states, international organization, or judicial authority with the paramount right—paraphrasing Chief Justice John Marshall’s description of the federal judiciary’s power in *Marbury v. Madison*—to say what the law is. There is no international Supreme Court.

International Judicial Institutions. That said, there are numerous international judicial institutions that, depending on the circumstances, may well be entitled to issue binding judgments against states. The most important of these, of course, is the ICJ. The authority of these courts, however, is based on the consent of the states concerned—consent that can be withdrawn in appropriate circumstances. Thus, for example, the United States withdrew from the ICJ’s “compulsory” jurisdiction in 1986. As a result, it is subject to the ICJ’s rulings only to the extent that some independent treaty provision vests that court with the power to adjudicate a dispute between the United States and one of its treaty partners.

In addition, with the exception of the ICC and other, *ad hoc*, international criminal tribunals (which can issue orders directed at individuals), international courts have no direct means of enforcing their judgments. As a general rule, they must depend on the voluntary compliance of the relevant states or seek the assistance of appropriate political institutions. The extent to which duly entered international judgments (where jurisdic-

29. *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2d Cir. 2000).

30. See *Restatement (Third) of Foreign Relations Law*, *supra* note 20, § 312 note 6.

31. See *id.*, § 312 cmt. i.

32. As noted by Professor Brierly, “It is a truism to say that no international interest is more vital than the observance of good faith between states, and the ‘sanctity’ of treaties is a necessary corollary.” J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* 331 (6th ed. 1963). That said, there are many circumstances in which the rights and duties undertaken by the parties to a treaty can and do change. *Id.*

tion was appropriate) may bind the courts of the United States remains an open question—even though the issue was before the Supreme Court, in the case of *Medellin v. Dretke*, in 2005.³³

This case involved the Vienna Convention on Consular Relations, a treaty to which the United States is a party. Among other things, this treaty requires that foreign nationals be permitted certain access to their country's consular authorities in case of arrest in the territory of another state party. A number of Mexican citizens have been convicted of capital crimes in the United States without having been granted this access—largely because it was unclear to local authorities either that the individuals were foreign citizens or that they wished the assistance of Mexican authorities. In any case, the Vienna Consular Convention does vest the ICJ with the authority to resolve disputes between parties, and pursuant to this provision, Mexico successfully sued the United States in that court. The ICJ issued its decision in 2004, determining that the United States had violated the treaty and ordering it to provide some means of reviewing and reconsidering the convictions of the effected individuals.³⁴

The Supreme Court accepted *certiorari* to determine the extent to which this decision actually bound the federal and state courts and whether the ICJ's interpretation of the Vienna Consular Convention should, in any case, be given effect as a matter of judicial comity. In the meantime, however, President George W. Bush issued a memorandum indicating that the United States would comply with the ICJ's order by having the state courts “give effect to the [ICJ] decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.”³⁵ In light of this determination by the President, the Supreme Court dismissed the case without deciding whether U.S. courts must implement properly entered ICJ decisions.

International Political Institutions. Although states are entitled to interpret their own international obligations, all members of the United Nations have agreed to abide by certain decisions of the United Nations Security Council—at least when that body acts in accordance with its power under Chapter VII of the U.N. Charter. Chapter VII vests the Security Council with the authority to “determine the existence of any threat to the peace” and to “decide what measures shall be taken.”³⁶ These measures can include diplomatic or economic sanctions, up to and including the use of force. U.N. member states are required to “join in affording mutual assistance in carrying out the measures decided upon by the Security Council.”³⁷

Of course, the Security Council is a political, not a judicial, body, and it is far from clear whether—even exercising its Chapter VII authority—it can articulate or establish a member state's legal obligations. As a practical matter, however, the Security Council's political decisions may well be sufficient to impose a particular result on one or more states regardless of the legal principles at issue—assuming that all of the Council's permanent, veto-wielding members determine to act with a sufficient level of force. Moreover, U.N. member states do have a legal obligation to comply with properly entered Security Council Chapter VII resolutions as a matter of treaty.

Other Means of Enforcing International Law. In addition to international judicial and political institutions—both relatively recent innovations—the more traditional methods of enforcing international norms include diplomacy and force. It is clearly the case that, over time, most disputes over the meaning and application of international law have been resolved through diplomatic means. This is preferable to other means, since it generally preserves the dignity and sovereignty of the relevant parties. Force, of course, has always been the

33. 125 S.Ct. 2088 (2005).

34. *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. No. 128 (Judgment of Mar. 31, 2004).

35. 125 S.Ct. at 2090.

36. U.N. Charter, art. 39.

37. U.N. Charter, art. 49.

ultimate sanction, as it remains today. In the past, states have often considered a violation of international legal obligations to be a *casus belli*, and state practice suggests that this remains true today—even in light of the U.N. Charter’s admonition that disputes be settled by peaceful means.³⁸ (Although practice over the past 50 years would also suggest that, apart from actions taken in self-defense, states are expected to seek U.N. assistance in resolving disputes before resorting to armed force on their own account. At a minimum, this certainly appears to be the Charter’s fair import.)

V. Who Are the “Subjects” of International Law?

Once, and not so very long ago, this was the first and most easily answered question regarding international law: International law applied to states. In the past 50 years, however, various forms of international law have been applied to international organizations and, most significantly, to individuals. It is out of the application of international law norms to individuals, both in terms of state officials and in terms of ordinary citizens, that many of the most contentious current international law controversies have grown. The application of international law to individuals often, if not always, undercuts the sovereignty of states and lacks democratic legitimacy.

The Traditional Rule. Traditionally, states (or, more appropriately, sovereigns) were the only “subjects” of international law. As noted by Vattel, “Every nation that governs itself...without any dependence on a foreign power, is a *sovereign state*. Its rights are naturally the same as those of any other state. Such are moral persons who live together in a natural society, under the law of nations.”³⁹ Individuals had few rights or obligations under international law, which addressed itself to their conduct only in certain very specialized areas, such as the law of piracy. Moreover, even here, international law merely established the rights of states to prescribe rules applicable to such individuals, who were generally considered to be stateless. Domestic law governed the trial and punishment of any actual offenses. This began to

change meaningfully only in the 20th century, mostly after the Second World War.

International Human Rights and International Humanitarian Law. Today, international law does provide certain rights to individuals—rights that states are required to honor and vindicate. Some of these rights are based on custom, although, by far, treaties are the most important source of these rights. The United States is bound by some of these agreements, such as the International Covenant on Civil and Political Rights (which it has ratified) and not by others, such as the U.N. Convention on the Rights of the Child (which it has not ratified).

As in all other areas, claims that the United States is bound by agreements it has not ratified must be treated with great skepticism. Where a state has not ratified a convention, involving human rights or otherwise, it can be bound to its provisions only if they independently represent binding norms of customary international law. Each provision or requirement of a treaty must meet this test separately, on its own merit. The inclusion of some binding norms in an agreement does not—and cannot—vest the entire document with that status.

In addition, the simple ratification of a treaty by a significant number of countries does not transform its provisions into customary international law. There is no international legislative authority. This is a particularly acute problem in the human rights area, since many states, over time, have signed and ratified human rights treaties that they have not implemented (and probably had no intention of implementing) with respect to their own populations. For example, Saudi Arabia, Cuba, Pakistan, Libya, and North Korea are all parties to the Convention on the Elimination of All Forms of Discrimination Against Women, but all persistently violate the basic human rights of women guaranteed under that treaty. American policymakers and diplomatic personnel should be especially wary of claims of legality or illegality based on conventions that have been implemented by few, if any, of the parties in actual practice.

38. U.N. Charter, art. 2(3).

39. Vattel, *supra* note 6, at 16 (emphasis in original).

On a more technical level, there is a generally recognized distinction between international humanitarian law, which properly refers to the customs and treaties governing humanitarian issues in the context of an armed conflict, and human rights law, which is much broader and intrusive into the relationship of a state to its citizens. In this connection, it is important to recall that the U.N.'s 1948 Universal Declaration of Human Rights is a statement of principle and aspiration, not a codification or statement of international law. This was made clear by Eleanor Roosevelt (one of the document's chief architects) in 1948 when she stated that the Universal Declaration is "not a treaty" and "does not purport to be a statement of law or of legal obligations."⁴⁰

Therefore, the United States does not, as is sometimes suggested, have to provide for or vindicate all of the "rights" identified in the Universal Declaration, including and especially the "rights" to social security, work, leisure, or an "adequate" standard of living. These claims, however, do serve to highlight one of the important problems with the international human rights law area. There are, throughout the world, fundamentally differing conceptions of the nature of a "right" as opposed to a social program provided by a government as a matter of policy. Under American law, "right" is normally used in referring to some individual entitlement or benefit that the government cannot interfere with, save in extraordinary circumstances, and that is legally binding and enforceable in the courts—such as the right to due process of law. Moreover, there are also very substantial disagreements over the nature and breadth of the rights that should be guaranteed and protected by law. Thus, for example, under the Constitution's First Amendment, Americans enjoy far broader rights to freedom of speech, press, and religion than do their counterparts in many other states, including the populations of other democracies.

Judicial Enforcement and the Alien Tort Claims Act. In the United States, international law "rights" are generally not enforceable through private lawsuits unless Congress has provided for such actions. However, there are certain circumstances when U.S. courts will enforce international law in a private suit, most notably under the Alien Tort Claims Act (ATCA). This law, originally enacted as part of the Judiciary Act of 1789, permits suits in federal court "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."⁴¹ Over the next 170 years or so, the ATCA supported federal jurisdiction in only one case. Beginning in the 1980s, however, there was a rush of litigation attempting to use the ATCA as a means of enforcing various international law norms in U.S. courts.

Nevertheless, the ATCA was and is a very limited jurisdictional grant. First and foremost, it contains no waiver of sovereign immunity and so cannot support a suit against United States government officials, and the Federal Tort Claims Act specifically does not waive immunity for claims arising in a foreign country. Second, the ATCA can support actions only for international "torts" that are universally recognized and established as such, and this is a very high bar to clear. The Supreme Court said this in *Sosa v. Alvarez-Machain*.⁴² That case involved a claim, for arbitrary arrest and abduction, by a Mexican citizen who had been seized and brought into the United States on charges that he had assisted in the torture and murder of an American Drug Enforcement Administration agent. The Court rejected Alvarez-Machain's claim that his seizure was in violation of international law and therefore cognizable under the ATCA.

As Justice Souter wrote for the Court, "We have no congressional mandate to seek out and define new and debatable violations of the law of nations."⁴³ Only those violations recognized in

40. 19 *Dep't of State Bull.* 751 (1948) (remarks of Eleanor Roosevelt, United States Ambassador to the United Nations). See also *Sosa v. Alvarez-Machain*, 542 U.S. at 734 ("the Declaration does not of its own force impose obligations as a matter of international law.").

41. 28 U.S.C. § 1350.

42. 542 U.S. 692 (2004).

1789, involving the mistreatment of ambassadors or acts of piracy, are encompassed by the ATCA, along with those modern norms “accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”⁴⁴ Alvarez-Machain’s claim for arbitrary arrest did not, the Court concluded, meet this exacting standard.

International Criminal Law. Probably more claims have been made for an “international criminal law,” with less basis in fact, than have been made for any other single aspect of international law. Although the idea of internationally recognized criminal violations is ancient—at least with respect to piracy—the application of such norms to individuals acting on behalf of their state dates almost entirely to the post–World War II period. Efforts to prosecute and punish government officials for alleged violations of international criminal norms are increasingly seen, both by certain governments and by activists, as a desirable means of controlling policy on the international and domestic levels.

The Nuremberg Trials. Advocates of international criminal law invariably identify the war crimes trials, especially the proceedings of the International Military Tribunal (IMT) sitting in Nuremberg, Germany, as support for the “international community’s” right to investigate, prosecute, and punish individual state officials who have arguably violated applicable international norms. In fact, as a matter of law, the post-war trials—both in Europe and in the Far East—were not justified by some inchoate international right to punish individuals for bad actions, but upon the unconditional surrenders of the Axis Powers. As the IMT itself explained:

The jurisdiction of the Tribunal is defined in the Agreement and Charter... [and] [t]he making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the

occupied territories has been recognized by the civilized world.⁴⁵

In the absence of such a military conquest, the legal right of one state or group of states to criminally punish the leadership of a third is highly questionable.

The U.N. Ad Hoc Tribunals. In 1993, partially as a means of doing something—anything—about the atrocities then taking place in the former Yugoslavia, the U.N. Security Council established the International Criminal Tribunal for the Former Yugoslavia. A year later, for similar reasons, the International Criminal Tribunal for Rwanda was created. The legality of these courts is certainly subject to challenge, since the Security Council does not itself have judicial authority. Nevertheless, as a practical matter, both courts have tried and sentenced a number of individual former state officials for offenses against the laws of war, crimes against humanity, and genocide. The United States has supported the efforts of both institutions.

The International Criminal Court. The United States has not supported the permanent ICC, established in 2002 pursuant to the 1998 Rome Statute of the International Criminal Court. As will be discussed more fully below, the ICC is principally a project of the European Union and claims jurisdiction over certain offenses committed anywhere within the territory of an ICC member state, whether or not the accused is an official or a citizen of one of these states. Because the Rome Statute is a treaty, its provisions cannot be imposed on the nationals of non-party countries, and this is one of the primary American objections to the court. The United States also has objected to the Rome Statute’s lack of any meaningful check on the ICC prosecutor and its potential both for politically motivated prosecutions and to undermine the unique role of the U.N. Security Council.⁴⁶

In fact, the most problematic aspect of the ICC is its ability to interpret and apply international law without regard to the views or consent of the

43. *Id.* at 728.

44. *Id.* at 725.

45. *The Nurnberg Trials*, 6 F.R.D. 69, 107 (1946).

state concerned and to enforce its opinion through criminal prosecutions against individual government officials. No international institution has ever claimed, or been permitted, such power—authority that is fundamentally inconsistent with the principles of sovereignty upon which the current international system is based.

International Law Immunities. The ICC also is particularly troubling because it purports to supersede the long-recognized immunity of individual government officials from legal action, either by the courts of another state or by international courts. These immunities developed from the basic rule that every sovereign was equal, and no sovereign, therefore, could claim judicial authority over any other sovereign. Today, especially with sovereign states often engaged in commercial or otherwise “private” activities, sovereign immunity is viewed by U.S. courts as a prudential matter and a question of comity. American sovereign immunity jurisprudence dates to Chief Justice John Marshall’s opinion in *The Schooner Exchange v. M’Faddon*.⁴⁷ There, the Court ruled that the U.S. has unlimited jurisdiction over persons and things within its territory but that, like other sovereigns, as a matter of comity, “members of the international community had implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases, such as those involving foreign ministers or the person of the sovereign.”⁴⁸

International law, however, has long recognized certain immunities from judicial process for individuals, including heads of state, ministers of foreign affairs, and similar officials—both as a matter of principle and as a matter of practical necessity. Claims by one state to judge the official actions of another state’s officials, especially when those actions took place within that state’s own territory,

undercut the very principle of territorial sovereignty explained by Justice Marshall in *The Schooner Exchange*:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.⁴⁹

Significantly, although many claims have been made—particularly since the Nuremberg trials—that these official immunities do not apply to “international crimes,” state practice suggests that they continue to do so. This was, in fact, the conclusion of the ICJ in a 2002 case, *Democratic Republic of the Congo v. Belgium*.⁵⁰ In that case, Belgium attempted to prosecute (on a “universal jurisdiction” theory) the Congolese foreign minister for alleged offenses within The Congo. That state opposed the prosecution and did not waive the official’s immunities. The ICJ noted that there was simply insufficient state practice suggesting that official immunity did not apply in these circumstances. In its opinion, the ICJ also usefully distinguished between the concept of immunity to judicial process, which The Congo’s foreign minister enjoyed, and the right to violate the law, which he did not. It was not a question of his having any right to engage in criminal activity on account of his office, but that the courts of Belgium—absent a waiver of immunity by the Congolese government—could not adjudicate the case.

The ICJ’s decision in *Congo v. Belgium* is important on a number of levels. First and foremost,

46. See Remarks of Mark Grossman, Under Secretary of State for Political Affairs, to the Center for Strategic and International Studies (May 6, 2002).

47. 11 U.S. (7 Cranch) 116 (1812).

48. *Austria v. Altmann*, 541 U.S. 677, 688 (2004).

49. 11 U.S. at 135.

50. *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 2004 I.C.J. No. 121 (Judgment of Feb. 14, 2002).

however, it shows how necessary it always is to measure the received wisdom in international law against the actual practice of states. Before this decision, few would have argued that—assuming proper jurisdiction—governmental immunity would have prevented an official's prosecution for alleged offenses, such as the war crimes and crimes against humanity at issue in that case. When the ICJ actually set about examining the basis of this supposed rule in state practice, that basis was found not to exist.

Current Controversies

I. The Role of the United Nations in International Law

The proper role of the United Nations in the ordering of international affairs and, indeed, the nature of that institution itself continue to be a major subject of controversy—especially between the United States and Europe. Members of the European Union increasingly view the United Nations as the primary forum in which international problems must be addressed. The United States, by contrast, continues to support the United Nations, and to use its institutions when and where this seems sensible and appropriate, but does not treat the U.N. as a uniquely legitimizing body. This has certainly been the case under President George W. Bush. It was also the case under President Bill Clinton—who determined to intervene in Kosovo using NATO rather than the U.N.

The U.N. Charter as an International “Constitution.” There is a widely held opinion (at least in certain international circles) that the United Nations Charter is more than a treaty. Because of the Charter's wide acceptance (nearly every independent state is now a member of the United Nations General Assembly) and important purposes, arguments have been made that it is more akin to an international constitution. This is not,

and cannot be, the U.S. view, since the Senate approved the Charter as a treaty, subject to all of the normal rules and understandings that accompany treaty-making. In addition, despite the fact that the Charter has been ratified by almost all of the world's nations, there is little state practice (as opposed to rhetoric) supporting a transfer of sovereignty to the U.N. Indeed, the Charter itself, which makes clear that the “Organization is based on the principle of the sovereign equality of all its Members,” belies such claims.⁵¹

The Use of Force. A number of European countries and the European Union itself openly take the view that only the U.N. Security Council can authorize the use of military force between states—with the single exception of repelling an ongoing invasion of a state's territory. This, of course, is not the American view. At a minimum, the United States has taken a much broader approach to interpreting Article 51 of the U.N. Charter, which states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.⁵²

Moreover, a careful reading of the Charter also suggests that the use of military force is specifically forbidden only in those instances where the purpose is to compromise the territorial integrity or political independence of a state.⁵³

II. The International Criminal Court

The establishment of a permanent International Criminal Court is one of the most important and controversial developments of the past 60 years, ever since the founding of the United Nations. Although there are numerous and fundamental problems—constitutional, philosophical, and practical—

51. U.N. Charter, art. 2(1).

52. U.N. Charter, art. 51.

53. U.N. Charter, art. 2(4). For a longer discussion of this issue, see David B. Rivkin, Jr., Lee A. Casey, and Mark Delaquil, “War, International Law and Sovereignty; Reevaluating the Rules of the Game in a New Century: Preemption and the Law in the 21st Century,” *Chi. J. Int. L.* 467 (2005).

with the ICC from the American perspective, the most important objection is that this institution is entitled under its founding document to interpret the international law obligations of its member states authoritatively and to enforce its opinion through the prosecution and punishment of individuals. In addition, in violation of long-accepted international law norms, the court claims jurisdiction over the citizens of non-party states in certain circumstances.

The U.S. Rejection of the Rome Statute. In 1998, the U.S. refused to sign the Rome Statute because—a largely European coalition of powers having rejected the Clinton Administration’s efforts to link the ICC’s jurisdiction to a resolution by the U.N. Security Council—there was no effective check on the court’s power. This was especially so with respect to the ICC prosecutor. At the close of his term in office, however, President Clinton did sign the Rome Statute, ostensibly so U.S. representatives could continue to participate in the negotiations framing the ICC’s rules of procedure and definitions of criminal offenses. However, at that time, President Clinton affirmatively recommended to his successor that the Rome Statute not be submitted to the Senate for its consideration because of that document’s very fundamental flaws.⁵⁴ In 2002, shortly before the Rome Statute came into force (because of the 60th ratification), President George W. Bush withdrew the United States’ signature from the instrument, making clear that the United States would not become an ICC state party.

The European Union’s ICC Policy. The European Union has made the achievement of “universality” for the ICC a major component of its collective foreign policy. This is hardly surprising, since the EU dominates the ICC. All EU member states must be ICC members, as must any state aspiring to become an EU member. As a result, the EU is the largest (indeed, the only) voting bloc in the ICC’s Assembly of State Parties, controlling a full quarter of the votes in that body (25 of 100). Of

the ICC’s 18 judges, 11 hail from EU states. Less understandable or acceptable is the EU’s insistence that American efforts to protect U.S. citizens against the ICC’s jurisdictional claims amount to demands for “impunity” under international law. EU officials know better.

Article 98 Agreements. Since the Rome Statute went into effect in 2002, the United States has sought and obtained dozens of agreements from ICC state parties that they will not hand Americans over to the court. These “Article 98” agreements, called after Article 98 of the Rome Statute, which, in fact, contemplates just such arrangements, were made necessary by the ICC’s insistence that its jurisdiction could be applied to American citizens (in appropriate cases) regardless of whether the United States ratified the Rome Statute. Both the Clinton and Bush Administrations have made clear that this claim itself violates international law. Moreover, in 2002, Congress enacted the American Servicemembers Protection Act,⁵⁵ which authorizes the President to use “all means necessary” to free American servicemembers, officials, and others working on behalf of the United States who are held by ICC authorities.

Neither Article 98 Agreements nor other U.S. efforts to ensure that Americans will not be subjected to the ICC’s power are directed at seeking “impunity” from international law for the United States or its citizens. The U.S. continues to acknowledge the binding effect of international law, as it has always done where it has recognized relevant and binding international norms, including applicable criminal norms. With respect to the ICC, it has simply rejected a new and revolutionary enforcement mechanism of dubious legal and practical merit. Moreover, the ICC is a treaty-based organization and can exercise no lawful authority over the United States or its citizens unless and until the Rome Statute has been ratified by the United States. Those who claim that, by insisting on its rights as an independent sovereign to protect itself and its people from the ICC’s pretensions, the

54. See Statement of President William J. Clinton Authorizing the Signing of the Rome Statute of the International Criminal Court (Dec. 31, 2000).

55. 22 U.S.C. §§ 7421–7432.

United States is seeking “impunity” have mistaken their own rhetoric for reality.

III. The War on Terrorism

At this time, the most confrontational international law differences between the United States and Europe involve the war on terrorism. By and large, Europe (at least the states of the EU) does not accept that there is a legally cognizable, ongoing armed conflict between the United States and al-Qaeda and its allies. The vast bulk of European opinion, both official and unofficial, views al-Qaeda as a law enforcement issue and (*sub silencio*) the American reaction to the September 11, 2001, attacks to have been disproportionate. As a result, many of the measures taken by the United States since September 11 are considered illegitimate, if not outright illegal, by much of Europe.

Guantanamo Bay. This is especially true of the U.S. detention facilities at Guantanamo Bay, Cuba, which have become a symbol in Europe for alleged U.S. overreaching. These facilities were established to detain the most dangerous individuals captured by U.S. and allied forces in Afghanistan. The United States has classified these prisoners as “unlawful” or “unprivileged” enemy combatants who are not entitled to the rights and privileges of prisoners of war under the Geneva Conventions but who may be held without criminal trial until hostilities are concluded. This classification has a long history in the laws and customs of war (describing individuals who fail to meet certain basic requirements, including a proper command structure, wearing uniforms, bearing arms openly, and eschewing direct attacks on civilians) and is fully recognized by the United States Supreme Court.⁵⁶ Nothing in the Court’s 2006 *Hamdan v. Rumsfeld* decision, which invalidated the rules established for military commission trials, changed this.

Most European states, however, have signed and ratified Protocol I Additional, an addendum to the 1949 Geneva Conventions. This treaty was particularly promoted by the International Committee of

the Red Cross, and its provisions attempt to regularize the status of unlawful combatants, especially the guerrilla and irregular fighters who comprised so many of the “national liberation movements” in the post–World War II period. It was, in fact, for this very reason that the United States rejected Protocol I. It is not a party to that instrument and is not bound by Protocol I’s requirements—except to the extent that they represent binding customary norms.

Opponents of American policy in the war on terrorism commonly claim that, in fact, Protocol I does constitute a binding statement of customary law and argue incorrectly that the United States has recognized as much. To support this point, proponents of this claim generally cite the 1987 remarks of Michael Matheson, then serving as Deputy Legal Adviser, Department of State. A careful examination of Mr. Matheson’s remarks, however, reveals that he did not suggest that Protocol I constituted a restatement of customary international law, but merely that a number of its provisions might have that status.⁵⁷ In this connection, he noted that, because of the difficulty in determining which rules enjoy sufficient “acceptance and observation” to be considered customary norms, “we have not attempted to reach an agreement on which rules are presently customary law, but instead have focused on which principles are in our common interests and therefore should be observed and in due course recognized as customary law.” This is, of course, a critical distinction between principles and rules in assessing what are the actual legal obligations of the United States. The U.S. has not accepted either that the category of “unlawful enemy combatant” has been abolished or that such individuals must be treated as Geneva POWs or civilian criminal defendants.

The Use of Stressful Interrogation Methods. The EU governments, along with a large portion of European public opinion, reject the use of stressful interrogation methods by the United States, claiming that these “amount to torture.” Whether stressful interrogation methods are appropriate as a means

56. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Ex parte Quirin*, 317 U.S. 1 (1942).

57. See Remarks of Michael J. Matheson: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 *Am. U. J. Int’l* 419, 421–424 (1987).

of obtaining intelligence from captured enemy combatants is a complex question of morality and expedience. As a legal matter, however, stressful interrogation methods are not inherently torture. In the relevant treaties (and U.S. federal statutes), torture is narrowly defined to encompass only the infliction of severe pain and suffering. Thus, the stress methods, such as isolation, sleep interruption, and standing, authorized by the United States for use on captured al-Qaeda and Taliban members are not “torture” *unless taken to a degree extreme enough to constitute severe pain and suffering*. Significantly, the European Court of Human Rights itself reached this conclusion in *Ireland v. United Kingdom* (1978), a decision construing very similar standards under EU human rights conventions.⁵⁸

In fact, *Ireland v. United Kingdom* involved Britain’s use of five stressful interrogation techniques—hooding, wall standing, subjection to noise, sleep deprivation, and reduced diet—in tandem against Irish Republican Army (IRA) members. The court ruled that these methods, even when used together, did not amount to torture. It did conclude, however, that when used together, these methods constituted cruel and inhuman treatment. This decision is, of course, not binding on the United States, but it does suggest that European claims that the United States has engaged in torture are ill-founded and that the U.S. could meet international standards simply by ensuring that the stressful interrogation methods employed at Guantanamo and elsewhere are not utilized together as done by Britain against the IRA. In any case, generic claims that “coercive” interrogation methods inherently amount to torture and that they are banned by international law are incorrect.

Other Controversial Policies. There are, of course, a number of other American policies in the war on terrorism that have been criticized or openly denounced in Europe. These include the claimed existence of “secret” U.S. detention facilities in Central and/or Eastern European countries, as well as the practice of “rendition”—transferring captured

terrorists to other (usually their home) countries. There have obviously been abuses committed by Americans during the war on terrorism—although the U.S. record in this regard compares very favorably with previous conflicts and, especially, with that of other countries. In defending the American legal position, however, the first question must always be: Is the United States actually subject to the norm it has allegedly violated? The second question is whether the U.S. interpretation of applicable norms is simply different from the prevailing view in Europe and/or elsewhere. As explained above, the United States is an independent sovereign with the right and obligation to interpret international law for itself. It does not have to accept the views of any other state or group of states, save in those circumstances where it has consented to do so. That is the essence of sovereignty.

Universal Jurisdiction. One means of avoiding that sovereignty, of course, would be to punish individual American officials in the courts of other states (which may take a different view of the applicable legal norms and their meaning) on a theory of “universal jurisdiction.” As a principle of judicial authority, universal jurisdiction has a long history. Before the 20th century, however, it was limited to offenses committed by non-state actors beyond the territorial limits of any state. Thus, all states were said to have the “universal” right to prescribe acts of piracy on the high seas, including the trans-oceanic slave trade. Even in this area, however, the right to prescribe did not automatically translate into the right to try and punish without some additional jurisdictional basis.⁵⁹

Since the end of World War II, however, claims have been made for a universal jurisdiction over offenses such as war crimes, crimes against humanity, genocide, and crimes against peace. These claims have been based largely on the Nuremberg trials. In fact, as explained above, the International Military Tribunal never claimed to act pursuant to “universal” jurisdiction or even under international law or

58. *Republic of Ireland v. the United Kingdom*, Series A, No. 25 (Judgment of Jan. 18, 1978).

59. For a more detailed discussion of this point and related authorities, see Lee A. Casey and David B. Rivkin, Jr., “The Dangerous Myth of Universal Jurisdiction,” in Robert H. Bork (ed.) *“A Country I Do Not Recognize” The Legal Assault on American Values* 135, 138–42 (Hoover 2005).

on behalf of the international community. Its authority was founded on the right of the victorious Allies to legislate for a conquered Germany. Nevertheless, increasingly extravagant claims have been made for universal jurisdiction, and in the 1990s, some European states actually enacted laws purporting to vest their courts with the power to try and punish universal jurisdiction offenses. The most notable was Belgium. The Belgian universal jurisdiction law was used to initiate proceedings against various Western leaders, including Israel's Ariel Sharon and U.S. Secretary of State Colin Powell, Vice President Richard Cheney, and General Tommy Franks. Belgium repealed the law after the United States made plain that NATO Headquarters could not remain in a country (in Brussels) where U.S. officials might face such judicial harassment.

In fact, there is little state practice, involving both a right to prescribe and punish "international" offenses, supporting universal jurisdiction. There are very few instances in which a country has attempted to punish an individual, let alone a state official, for offenses that did not take place on its own territory or against its own citizens. Moreover, and more to the point, there are even fewer examples—if any at all—in which a state whose citizen or official has been targeted for such a prosecution accepted the assertion of this judicial power based on a belief that it was legally required to do so because of some "universal" right to try and punish certain crimes. In short, universal jurisdiction is a theory of international law that has very little basis in reality.

IV. International Law as a Tool of Statecraft, and "Lawfare"

The lack of actual state practice establishing universal jurisdiction is hardly surprising. International law has always been used as a tool of statecraft, and the "legal" right to prosecute and punish another state's officials would be an especially dangerous addition to the toolbox. (This is, of course, exactly what the ICC states parties have contrived for themselves—although the authority is vested in a non-state institution—and only time will reveal whether

they have made a mistake.) A state's view of international law generally, and of particular norms, often changes over time as its role in the world changes.

In particular, when assessing the requirements of international law, states usually do so in light of their national interests. For example, during the 16th and 17th centuries, the British often argued for a broad "freedom of the seas" principle as against the Spanish, whose maritime colonial and commercial interests were far greater and more developed than Britain's. By the 18th and 19th centuries, however, the British view about a number of key maritime law issues had changed dramatically because Britain had emerged as the leading—indeed, overwhelming—naval power. In considering claims by other states that the United States is violating international law, one eye should always remain firmly on this reality. (By the same token, in determining whether to use international law as a justification for a preferred U.S. policy, it should always be kept in mind that the hallmark of law, including international law, is neutral application. Supporting a particular view of international law in a given circumstance may, in short, prove to be a double-edged sword in another circumstance.)

This is especially true in light of the development of "lawfare." This term, first used in this connection by Brigadier General Charles A. Dunlap, Jr., U.S.A.F., means "the strategy of using, or misusing, law as a substitute for traditional military means to achieve an operational objective."⁶⁰ A practical, textbook example of this phenomenon is the al-Qaeda training manual (seized in Manchester, England, in 2001), which states that captured "brothers" should claim to have been tortured while in custody. There is little doubt that the United States is, at least currently, the primary target of lawfare and that this weapon can be an effective one if such claims are not forcefully and consistently challenged and rebutted.

Conclusion

In approaching questions regarding international law and international institutions, there are a

60. Charles J. Dunlap, Jr., "The Role of the Lawyer in War: It Ain't No TV Show, JAGs and Modern Military Operations," 4 *Chi. J. Int'l L.* 479, 480 (2003).

number of basic points that American policymakers, both in the executive branch and in Congress, should keep firmly in mind.

- As an independent and sovereign state, the United States is bound by international law, and it must especially respect its treaty obligations.
- International law, however, is fundamentally different, both in its conception and in its application, from domestic law. It is not made by legislation, nor is there any inherent legislative authority in the “international community,” however that term may be defined.
- States alone can make international law by their own actions.
- Every independent state has an equal right and obligation to interpret and apply international law for itself. This is a fundamental and inherent attribute of sovereignty.
- There is no state, group of states, or international institution with the right to determine or adjudicate the legal obligations of states, save to the extent that the relevant state or states consent to be bound.
- In determining what a state’s international legal obligations and rights may be, the critical factor is the actual practice of states. This is true both with respect to customary international law (where the practice of states prevails) and in discerning the proper interpretation and application of treaties (where practice can elucidate the treaty’s proper scope and meaning).
- In assessing state practice, the key inquiry is whether states have observed a particular rule or norm, in relevant circumstances, out of a feeling of being legally bound to do so. Actions taken based on political or practical expedience, or from considerations of good will or courtesy, are not reliable indicia of what international law requires.
- The United States cannot be legally bound to treaties, however widely accepted by the international community, that it has not ratified. At the same time, the President should avoid signing treaties that he does not believe will be approved by the Senate, since this may result in (admittedly disputable) claims that the United States must avoid taking action that would defeat the treaty’s “object and purpose” even where it is not a treaty party.
- Claims that a state has the right to exercise “universal jurisdiction” should never be accepted at face value. Although the concept of universal jurisdiction (the right of all states to proscribe and punish certain conduct of international interest, such as war crimes), has a long history, there is very little actual state practice supporting the right of one state to adjudicate and punish the citizens and/or officials of another state merely because the alleged offense is of a “universal” character or concern.
- In refusing to accept either the interpretation of international law adopted by other states or the authority of international institutions claiming the right to adjudicate international law claims, the United States is not violating its international obligations or seeking “impunity.” It is merely exercising its indisputable rights as an independent sovereign.
- Sovereignty is not some abstract concept that can or should be redefined by an indeterminate and inchoate “international community.” It is the right of the American people, and of all peoples, to govern themselves in accordance with their own institutions and by their own consent. It is the basis of our right to make law for ourselves.

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