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INTERNATIONAL LAW BY CONSENT OF THE GOVERNED

José A. Cabranes*

I. INTRODUCTION¹

These days we hear more about “international law” than usual, especially in political discourse and the national press. We are informed, in the heat of political combat, that the pellucid terms of international law have been flagrantly violated or, on the contrary, that international law does not exist or is largely a concoction of rogue regimes acting in concert.

These oversimplifications would be harmless enough but for the fact that they affect public opinion and have significant real-life consequences in our national and international politics. The contemporary interest in international law has been stimulated by the phenomenon of “globalization” – a fashionable, overarching term that embraces a multitude of international trends in trade and telecommunications. Skepticism about international law has been the inevitable consequence of the sheer breadth, and more-than-occasional indeterminacy, of a body of law that potentially touches virtually any private or public transaction affecting more than one nation-state. The skepticism engendered by the problem of defining and delimiting “international law” is reinforced by the grandiose claims for a seemingly unlimited body of law asserted, especially in the last generation, by a combination of scholars and activists who include proponents of a world order in which national sovereignty yields to norms elaborated by supranational organizations.

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¹ I am grateful to the Dean and Faculty of the Valparaiso University School of Law for the invitation to deliver the 2006 Indiana Supreme Court Lecture, which afforded me the opportunity to reflect on timely aspects of customary international law. In this lecture, I expand on themes developed earlier in the year in the Jon O. Newman Lecture at the University of Hartford, an endowed lectureship established in honor of my friend and admired colleague, Judge Jon O. Newman of the United States Court of Appeals for the Second Circuit. These reflections rely in some measure on the jurisprudence of the Court on which I am privileged to serve, including decisions which I have written or in which I have participated. I would also like to thank my law clerks Bryan Leach, Jonathan Goldin, Michael Jacobsohn, and Anisha Dasgupta for their editorial comments and assistance.

Naturally, proponents of varying conceptions of international law have taken their causes not only to the press and the political rostrum but also to the courts, where litigation involving private parties, as well as nation-states and foreign public instrumentalities, regularly brings before our judges questions arising under bilateral and multilateral treaties and, significantly, claims under “customary international law.”

In attempting to remain above the political fray, judges face their most serious challenges when asked to recognize and apply this “customary law,” which is an outgrowth of the historic interaction of states in a world community of nearly 200 sovereign states. These are challenges for which most of us are understandably ill-prepared, because such situations invariably require judges to decide cases with little or no guidance from positive law adopted by democratically-elected legislatures. As a corollary, such situations present judges with unequalled opportunities to decide cases on the basis of personal inclinations. By presenting judges with opportunities to decide cases free of the restraints of positive law, cases asserting claims under customary international law are an open invitation to judges to adopt the style of common law judges—suddenly we are wearing the toga of Blackstone or Lord Mansfield as we decide cases by roving freely across the terrain of modern history and international politics. In the nature of things, such judicial decisions, if wholly unmoored from our domestic democratic processes, will raise serious questions about the legitimacy of the judicial power being asserted—questions that no amount of instruction on judicial independence can or should silence.

Thus, it seems to me desirable to try to explain—in a way that invokes basic guiding principles rather than grandiose pronouncements, even at the risk of appearing simplistic myself—how in the modern era international law is *used* properly and how it can be *misused*.

II. (MIS)PERCEPTIONS OF INTERNATIONAL LAW

Sir Isaiah Berlin once observed that the case against international law, like the case against historical objectivity, is that “it does not exist.”² Berlin’s remark captures the first of *three widespread intuitions* about international law that I would like to address—namely, that international law is more of an aspiration than a reality. After all, there is no such thing as a World Government.³ And even if there were some international body charged with regularly making “international law” in the legislative sense

² Ferenc M. Szasz, *The Many Meanings of History, Part II*, 8 HISTORY TEACHER 54, 60 (1974).

³ See *infra* note 35 and accompanying text (observing that the United Nations General Assembly lacks law-making ability).

of “law,” the challenges of enforcing that law against nation-states would be formidable.

Second, it may seem to the casual observer that international law is deeply controversial—a constant source of argument in legal and foreign policy circles alike. Recent events concerning sensitive issues related to security and sovereignty illustrate the point. As one example, our government’s response to the terrorist attacks of September 11th has sparked heated debate over whether certain laws of war apply in an ongoing conflict against Al-Qaeda, a group of non-state actors who deliberately target innocent civilians.⁴ As another example, the decision of the United States under successive national administrations not to ratify the treaty creating the International Criminal Court has provoked accusations that Americans consider themselves beyond responsibility for criminal acts.⁵

A third popular conception is that international law is a relatively new phenomenon. We are all reminded regularly that we live in an “Era of Globalization,” that the world is both “shrinking” and “flat,” and that nation-states are becoming ever more interconnected and interdependent. Students learn that it was only in the aftermath of the First World War that the League of Nations was formed, and it was only after the Second World War that the United Nations and the European Union were founded. In light of these Twentieth Century events, it is perhaps natural for many to regard the development of international law as a product of recent vintage.

I should stress that there is an element of truth to each of the three notions about international law that I just mentioned. It is true that there is no comprehensive, definitive code of international law binding on all nation-states. It is true also that international law at times evokes strident controversy; and that, in recent decades, international law has indeed acquired a degree of public prominence previously unknown.

Current discussions of the place of international law in the scheme of things suggest that it might be useful to try to restate some basic propositions. I will attempt to do so as I describe briefly (a) where international law comes from, (b) how it operates in practice, and (c) what aspects of international law seem to me most problematic today in the United States—in other words, the *uses* and *misuses* of international law.

⁴ See generally NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS (David Wippman & Matthew Evangelista eds., 2005).

⁵ See W. Michael Reisman, *Learning to Deal with Rejection: The International Criminal Court and the United States*, 2 J. INT’L CRIM. JUST. 17, 17-18 (2004).

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A return to basics necessarily involves great oversimplification, and it is entirely possible that my restatement of basic principles – which focuses on the relationship between democratic processes and international law (that is, whether and how international law reflects the consent of the governed) – will elicit little more than a yawn of approval reflecting a kind of informed ennui. If so, I will consider this effort successful. On the other hand, if this effort at restating basic rules elicits disapproval – if the idea that consent by sovereign states is a *sine qua non* of the creation of “law” rings hollow – I would welcome the opportunity to be informed of what other bedrock principles govern the development of international law.

I should say at the outset that in our times the term “international law” can be used loosely to refer to many different concepts, any one of which could form the subject of a full lecture. For instance, one could choose to focus on human rights law, international criminal law, private transactions between citizens of different countries, diplomatic and consular law, or, indeed, any analysis of legal problems touching on more than one country – what some call “transnational law.”⁶

For the purposes of this presentation, when I refer to “international law,” I refer specifically to *public* international law, which is chiefly concerned with the rules, principles, customs, and agreements that nation-states and other international entities accept as having the force of law in their relations with one another. In contrast to *comparative law* and *private international law*, which involve the domestic laws of two or more countries and trans-border private disputes, *public international law* focuses on the rules that emerge from agreements *between* states about matters of mutual concern.

Thus, my concern today is *not* with a related, and no less controversial, subject that has made its way into the mainstream media lately – the asserted propensity of U.S. courts to rely on foreign law when interpreting the U.S. Constitution and invalidating American statutory law.⁷ Although

⁶ See, e.g., HENRY J. STEINER, DETLEV F. VAGTS & HAROLD HONGJU KOH, TRANSNATIONAL LEGAL PROBLEMS (4th ed. 2001); Harold Hongju Koh, *International Law As Part of Our Law*, 98 AM. J. INT’L L. 43, 52-53 (2004) (discussing “transnationalist jurisprudence” that avoids “distinguish[ing] sharply between the relevance of foreign and international law, recognizing that one prominent feature of a globalizing world is the emergence of a transnational law, particularly in the area of human rights, that merges the national and the international”).

⁷ See, e.g., *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (stating that, for almost 50 years, the Supreme Court “has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishments’”); *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (holding that criminalization of consensual homosexual sex between adults is unconstitutional, and stating that “[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many

this practice is similar to the application of international law in that they both allow ample space for courts to apply common law methodology, international law is more than an interpretive tool. Under our Constitution's express terms, international law is part of the law of the United States, deriving its legitimacy from the consent of sovereign states to be bound by certain rules and helping to order the relations of those states in ways that are pervasive, if not always evident to the outside observer.

III. ORIGINS OF PUBLIC INTERNATIONAL LAW

Public international law is not a concept of recent vintage. Its modern roots lie in the natural law philosophy of Sixteenth and Seventeenth century Europe. Of particularly enduring influence from that time has been the work of the Dutch jurist Hugo Grotius (1583-1645), who proposed a body of law applicable to all people and based on universal values divined from "religious, moral, rational, and historical reflections."⁸ Grotius was among the first to expound the concept of territorial sovereignty, the principle of legal equality of states, and the idea of the sea as international territory. Certain of these principles were later recognized in the Peace of

other countries" and "[t]here has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent"). *See generally*, Mary Ann Glendon, *Judicial Tourism*, WALL ST. J., Sept. 16, 2005, at A14; Jess Bravin, *Congress May Fight Court on Global Front*, WALL ST. J., Mar. 21 2005, at A4.

This practice has engendered opposition not only among commentators, *see, e.g.*, Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFFAIRS, July-Aug. 2004, at 40-42; J. Harvie Wilkinson III, *The Use of International Law in Judicial Decisions*, 27 HARV. J.L. & PUB. POL'Y 423, 425-29 (2004); Ernesto J. Sanchez, *A Case Against Judicial Internationalism*, 38 CONN. L. REV. 185 (2005), but also in Congress, *see, e.g.*, S. Res. 92, 109th Cong. (2005) ("Expressing the sense of the Senate that judicial determinations regarding the meaning of the Constitution of the United States should not be based on judgments, laws, or pronouncements of foreign institutions unless [they] inform an understanding of the original meaning of the Constitution of the United States."); H.R. Res. 97, 109th Cong. (2005) (utilizing the same language as the Senate Resolution); *cf.* Military Commissions Act of 2006 § 6(a)(2), Pub. L. 109-366, 120 Stat. 2600, 2632 ("No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting" prohibitions of grave breaches of Common Article 3 of the Geneva Conventions).

⁸ 1 L. OPPENHEIM, INTERNATIONAL LAW 16 (Ronald F. Roxburgh ed., 3d ed. 1920). Grotius also emphasized the idea of "*jus gentium* . . . laws established by consent which look to the good of the great community of which all or most states are members." J.L. BRIERLY, THE LAW OF NATIONS 30 (Sir Humphrey Waldock, ed., 6th ed. 1963). Yet Grotius's conception of consent was not independent of natural law's metaphysical underpinnings. *See id.* at 30-31.

Westphalia,⁹ the treaty that ended the Thirty Years' War in 1648 and marked the beginning of the modern era in European history.¹⁰

In the Eighteenth and Nineteenth centuries, the concept of international law became heavily influenced by a different school of thought—the “Positivist” school—which emphasized the importance of treaties and international customs as the main sources of international obligations. The Positivists distinguished themselves from their predecessors by looking to the actual practices of states rather than to natural law. By analyzing the obligations that states had actually undertaken, and how widely these obligations were recognized and respected, the Positivists were able to identify a set of rules that could be called “international law.”¹¹

The early and permanent imprint of the Positivist approach to international law can be clearly seen in the constitutional history of the United States. As early as 1796, the U.S. Supreme Court stated that, “[w]hen the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.”¹²

In fact, the Constitution expressly recognized *two different kinds* of international law. First, it recognized the kind of international law that is made by agreements or treaties among nations. Second, it recognized the kind of international law that arises from long-standing practice and custom. This brand of international law has since come to be known as “customary international law.”

The Framers provided that treaties would be part of the “supreme Law of the Land,”¹³ but specified that, in order to enjoy that venerated status, treaties must be ratified by the President with the advice and consent of the

⁹ See Hedley Bull, *The Importance of Grotius in the Study of International Relations*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS 65, 75-78 (Hedley Bull et al., eds., 1990); Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 AM. J. INT'L L. 20, 21-25 (1948).

¹⁰ See generally, BRIERLY, *supra* note 8; L. OPPENHEIM, INTERNATIONAL LAW (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1996). On the treaty of Westphalia, see HERBERT LANGER, THE THIRTY YEARS' WAR (Blandford Press, 1980); C.V. WEDGWOOD & ANTHONY GRAFTON, THE THIRTY YEARS WAR (2005).

¹¹ Indeed, it is the great Positivist Jeremy Bentham who is credited with coining the term “international law” to replace “the law of nations” in 1789. M.W. Janis, *Jeremy Bentham and the Fashioning of “International Law”*, 78 AM. J. INT'L L. 405 (1984).

¹² *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) (Wilson, J.).

¹³ U.S. CONST. art. VI, § 1, cl. 2 (“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 . . .”).

Senate.¹⁴ The authority to bind the United States to a treaty was vested in part in the executive branch and in part in the legislative branch precisely because treaties were akin to contracts between sovereign nations – and therefore were not perfectly analogous either to the formulation of law, the main function of the legislative branch, or to the implementation of law, the main function of the Executive.

As Alexander Hamilton explained in the *Federalist Papers*:

The power of making treaties . . . relates neither to the execution of the subsisting laws, nor to the [enactment] of new ones . . . Its objects are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive.¹⁵

But treaties were not the Framers' sole area of international concern. Our Constitution also specifies that "Congress shall have Power. . . [t]o define and punish Piracies and Felonies committed on the high Seas, *and Offences against the Law of Nations* . . ." ¹⁶ This is a reference to a body of customary international law.

Thus, international law was *not* introduced to Americans or to American law in the Twentieth Century, either as a byproduct of the First World War and Wilsonian internationalism, or as a byproduct of the Second World War and the United States' membership in the United Nations. On the contrary, concepts of international law were quite familiar to the founders of the American Republic – so much so that they were woven into the fabric of our Constitution. Consequently, it was possible for Chief Justice John Marshall to write in 1815 that "the [Supreme Court] is bound by the law of nations, which is part of the law of the land."¹⁷

Of course, since the founding of the United States, the actors and actions that we regard as relevant to "international law" have broadened

¹⁴ U.S. CONST. art. II, § 2, cl. 2 (The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .").

¹⁵ THE FEDERALIST No. 75, at 500 (Alexander Hamilton) (P. Ford ed., 1895).

¹⁶ U.S. CONST. art. I § 8 cl. 1 & 10. On the meaning of "the law of nations" in the early Republic, see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714-15 (2004).

¹⁷ *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815).

substantially. In particular, the Twentieth Century has brought about a range of international organizations, such as the United Nations and its many specialized agencies (for example, the World Health Organization and the Food and Agriculture Organization), as well as *supranational* institutions, such as the European Union.

In addition, as a direct result of Nazi atrocities and the defeat of the Axis Powers, international law increasingly has concerned itself with the basic rights of individuals, and not merely the rights and duties of nation-states in their interactions with one another. As a result, we have seen in the past sixty years international agreements designed to address various human rights concerns—such as the U.N. International Covenant on Political and Civil Rights¹⁸ and the International Convention on the Elimination of All Forms of Racial Discrimination¹⁹—both of which have been ratified in whole or in part by the United States.²⁰

IV. THE POLITICAL CONTROVERSIES AND UNCONTROVERSIAL USES OF INTERNATIONAL LAW

Insofar as the evolution of international law has threatened to encroach upon the traditional prerogatives of the nation-state, it has generated new and potent controversies. This is well illustrated, for instance, by the recent debate over the United States's decision, under both Democratic and

¹⁸ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (ratified by the United States June 8, 1992) [hereinafter ICCPR].

¹⁹ International Convention on the Elimination of All Forms of Racial Discrimination, December 21, 1965, 660 U.N.T.S. 195 (ratified by the United States Oct. 21, 1994). For a discussion of this agreement, see LOUIS B. SOHN & THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 856-913, (1973).

²⁰ The United States ratified the ICCPR in 1992 subject to certain reservations, understandings, and declarations. In particular, the Senate specified that “the provisions of Articles 1 through 27 of [the ICCPR] are not self-executing,” 138 Cong. Rec. S4781-01 (1992), and “do not create a private cause of action in U.S. Courts,” S. Exec. Rep., No. 102-23, at 15 (daily ed. Apr. 2, 1992). Accordingly, the ICCPR creates no rights enforceable by individual suit. See, e.g., *Poindexter v. Nash*, 333 F.3d 372, 379 (2d Cir. 2003); *Romeu v. Cohen*, 265 F.3d 118, 135-36 n.8 (2d Cir. 2001). The United States has not ratified either of the Optional Protocols to the ICCPR. See Office for the United Nations High Commissioner for Human Rights: Status of Ratification of the Principal International Human Rights Treaties, at 11, available at <http://www.unhchr.ch/pdf/report.pdf>. The First Optional Protocol allows the U.N. Human Rights Committee to consider complaints filed by individuals under the ICCPR. See Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21, U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966). The Second Optional Protocol provides for the abolition of the death penalty. See Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/824 (1989).

Republican presidents, not to ratify the Rome Statute, which created the International Criminal Court.²¹

In light of that decision, some have criticized the United States for lacking a due regard for international law or for failing to assume appropriate international responsibilities. Those who defend the U.S. position have expressed a bipartisan concern at losing control over an important state decision—namely, the decision whether and on what terms to prosecute one’s own nationals for alleged crimes.²² This question is, in the last analysis, a question of politics, not law. Regardless of its merits, the decision by both the Clinton and Bush administrations not to seek the Senate’s approval of the Rome Statute illustrates a strong public desire, across party lines, to preserve what is perceived as an important national prerogative and to avoid making American officials vulnerable to international procedures that might camouflage hostility to the policies or interests of the United States and its allies.²³

Yet the emergence of high-profile controversies such as this one should not cause us to lose sight of the fact that the United States government *routinely* generates and complies with international law in the form of bilateral and multilateral agreements with foreign governments. Although a few well-known multilateral treaties, not accepted by the U.S., tend to

²¹ Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998 (effective July 1, 2002; U.S. not a party), U.N. Doc. A/CONF.183/9 (1998), 37 I.L.M. 999. Under the outgoing Clinton Administration, the United States signed the Rome Statute on December 31, 2000, the last day it was open for signature; on May 6, 2002, the Government of the United States notified the United Nations that the United States did not intend to become a party, an act popularly referred to as “unsign[ing].” Diane F. Orentlicher, *Unilateral Multilateralism: United States Policy Toward the International Criminal Court*, 36 CORNELL INT’L L.J. 415, 421-22 (2004); see also Peter Slevin, *U.S. Renounces Its Support of New Tribunal for War Crimes*, WASH. POST, May 7, 2002, at A01.

²² See Orentlicher, *supra* note 21, at 420-21 (discussing how the Clinton Administration, despite being confident that the terms of the Rome Statute on their face were workable, nevertheless was concerned about “the risk of a runaway court—one that would respond sympathetically to politically-motivated charges against U.S. nationals”). During a speech before the Commonwealth Club in September 2002, Al Gore stated that he approved of the Bush Administration’s decision not to seek ratification of the Rome Statute. See Al Gore, *Former Vice President, Iraq and the War on Terrorism, Answers to Written Questions From the Floor Following a Speech Before the Commonwealth Club of California* (Sept. 23, 2002), <http://www.commonwealthclub.org/archive/02/02-09gore-qa.html> (“I thought that this world criminal court was flawed, and maybe a compromise could have been worked out but I thought the administration made the right call on that one—a lot of people disagree . . .”).

²³ That the Clinton Administration did not sign the Rome Statute until the latest possible date, at a time when the prospect of ratification would create political fallout only for the incoming Republican Administration, see *supra* note 21, may provide a more partisan example of the interplay between democratic processes and international law.

capture the public's imagination — such as the Rome Statute and the Kyoto Protocol on Climate Change²⁴ — the reality is that the United States abides by the terms of countless treaties and executive agreements²⁵ that have entered into force following the action of the political branches of our government, as prescribed by the Constitution.²⁶

The attention devoted to the Rome Statute and the Kyoto Protocol is justified inasmuch as our government's position on whether to ratify these treaties is a legitimate subject of *political* debate. But we must always distinguish between *political* questions concerning whether the United States should enter into a particular international agreement and *legal* questions concerning the lawfulness of conduct when measured against the yardstick of existing international obligations. To put it another way: a question about what obligations the United States should assume under international law is a *political* question and one on which the views of the judiciary are irrelevant.

Moreover, the care and caution with which the United States enters into treaties is not new. It is the traditional, and virtually unavoidable, care and caution taken by a country whose Constitution provides an explicit and honored place for international law — a country that takes the law seriously and that takes formal international obligations seriously.

It is precisely *because* the United States takes the law seriously, and takes seriously the international legal obligations that it assumes, that its leaders are cautious and careful in their approach to new and complicated international agreements. Again, this is true regardless of the party in power. Although the United States is often accused of shirking its international obligations because of its unwillingness to ratify certain treaties, reluctance to assume new treaty obligations — whatever those obligations may be — does not necessarily translate into indifference to international law. Indeed, I suggest to you that a refusal to ratify a treaty may indicate quite the opposite; not ratifying a treaty may signal just how

²⁴ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 37 I.L.M. 22.

²⁵ An executive agreement is "an international agreement entered into by the President, without approval by the Senate, and usually involving routine diplomatic or military matters." BLACK'S LAW DICTIONARY 610 (8th ed. 2004). For example, "[m]aking executive agreements to settle claims of American nationals against foreign governments is a particularly longstanding practice." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003). For a discussion of congressional attempts to limit the President's authority to make executive agreements throughout the latter half of the Twentieth Century, see Louis Henkin, *Treaties in a Constitutional Democracy*, 10 MICH. J. INT'L L. 406, 417-19 (1989).

²⁶ See generally U.S. Dep't of State, *Treaties in Force 2005*, <http://www.state.gov/s/1/treaties/c15824.htm>.

seriously American administrations, of both major parties, regard the making of treaties.

The care and caution of the United States in entering into international agreements is a result of the importance of our country in the international system and also a result of our abiding commitment to the rule of law. After all, the less important a state is in the international system the less consequential it may be whether that state does or does not comply with its treaty obligations. And it is easy enough for an inconsequential state, and for authoritarian or totalitarian regimes with no tradition of the rule of law, to ratify treaties that they will quickly ignore and violate.²⁷ Yet by requiring that *two-thirds* of the Senate consent to a treaty before its ratification, our Constitution ensures that we will not enter into binding legal obligations unless a broad consensus clearly supports the proposition that such obligations are both in the national interest and worth risking our national reputation.

The former Soviet Union famously ratified all manner of international human rights treaties that it ignored in practice, while it cavalierly condemned the United States for refusing to ratify some agreements that, for example, seemed to conflict with American conceptions of free speech.²⁸

²⁷ Oona A. Hathaway's "large-scale quantitative analysis of the relationship between human rights treaties and countries' human rights practices," Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1939 (2002), revealed that "[c]ountries with worse human rights ratings often ratify treaties at higher rates than those with better ratings, and human rights treaty ratification is often associated with worse ratings than otherwise expected." *Id.* at 2013-14. These results, Professor Hathaway explained, may be traceable to the following "cross-cutting pressures":

Countries with worse human rights practices face greater potential costs of joining a treaty to the extent that they expect it to be monitored and enforced. But they also stand to gain more from the expression of adherence to the treaty, particularly where they are under external pressure to exhibit their commitment to human rights norms. At the same time, they may have less reputational capital to lose. If countries with worse human rights practices also have worse reputations for law-abidingness than those with better practices, they may be more willing to join treaties with which they are not certain they will be able to comply.

Id. at 2013.

Similarly, Professor Hathaway's analysis seems applicable to a nation-state that lacks economic, military, or cultural influence, which may benefit from expressing its commitment to a treaty, while risking relatively little in terms of its pre-ratification capital (reputational or otherwise) should it fail to comply.

²⁸ See MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 360-69 (1993) (discussing disagreements among socialist and non-socialist countries over restrictions on freedom of speech in the ICCPR); see also Hedrick Smith, *Moscow Ratifies 2 U.N. Covenants on Human Rights*, N.Y. TIMES, Sept. 28, 1973, at 1, 6 (discussing the

It may also be a simple task for the new government of a developing country to ratify treaties that it hopes will bolster its reputation abroad and serve an aspirational purpose at home. For example, after the fall of the Taliban, Afghanistan ratified the Convention on the Elimination of All Forms of Discrimination Against Women.²⁹ Yet without the political will or material means to make such a treaty anything but a series of empty promises, disillusionment both with the specific goals of the treaty and with the general principles of treaty-based law may follow. The United States historically has not entered into treaties lightly precisely because it strives to be faithful to the principle that, as Justice Hugo Black wrote, “[g]reat nations, like great men, should keep their word.”³⁰

Moreover, political decisions declining to join a particular international agreement remind us of the simple fact that when the United States assumes treaty obligations, it does so under our democratic processes. As noted earlier, the Constitution ensures that presidential decisions on treaties will invariably be affected by the views of the Senate.

It is often forgotten that the Senate, on July 25, 1997, adopted, by a unanimous vote of 97-0, the Byrd-Hagel resolution. This resolution, co-sponsored by the senior Democratic member of the Senate, urged President Clinton *not* to submit to the Senate for its consideration the Kyoto Protocol. This unanimous resolution of the Senate apparently reflected the views of major constituencies, including organized labor as well as business. In these circumstances, it should not surprise us that President Clinton effectively took the advice of the upper house of our democratically-elected legislature, and that his successor in the White House, President George W. Bush, did so as well.

Moreover, while some proposed treaties garner substantial attention in the press because of our government’s reluctance to embrace them – like the Rome Statute and the Kyoto Protocol – many others, which are ratified by the United States, deal with mundane matters that one might not typically associate with international law: for example, the recently ratified Treaty on the Encouragement and Reciprocal Protection of Investment between the

Soviet Union’s ratification of the ICCPR and ICESCR and reporting one U.S. State Department official as explaining that the United States had not signed the covenants because “they fell short of the American concept of human rights[,]” for example, the ICCPR “contained loopholes by which emigration could be barred . . .”).

²⁹ G.A. Res. 34/180, 34 U.N. GAOR Supp. No. 46 at 193, U.N. Doc. A/34/46 (1981), 19 I.L.M. 33 (1980); see also <http://www.un.org/womenwatch/daw/cedaw/states.htm> (memorializing Afghanistan’s ratification of the Convention).

³⁰ Federal Power Comm’n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

United States and Uruguay.³¹ Thus, we see a continuing commitment on the part of the American people to law-based international cooperation, not only in the treaties that we are cautiously reluctant to ratify but also in the treaties that we embrace and abide by.

V. THE REAL CONTROVERSIES:
CUSTOMARY INTERNATIONAL LAW AND PEREMPTORY NORMS

Thus far, I have tried to dispel, or at the very least complicate, the perception that international law is something new or exotic in the American system or a byproduct of Twentieth Century “globalization.” I have also noted that high-profile political controversies regarding certain treaties tend to overshadow the uncontroversial uses of international law. In other words, international law is a long-standing framework or process that governs the interaction of nations and much of it is routine, offering little to excite the public imagination.

I now turn to what I think is one of the more controversial aspects of international law today from both a political and legal perspective. The controversy to which I refer has little to do with the Rome Statute, the Kyoto Protocol, or any other foreign policy dispute that dominates the headlines. Instead, it is chiefly about the invocation of “international law” – and, in particular, “customary international law” – in our courts.

We can all generally understand that international treaties are agreements pursuant to which the parties (that is, nation-states) *expressly* consent to be bound. But “customary international law” is something different. Roughly formulated, “customary international law” is that law which results *not* from an obligation assumed by a state pursuant to a treaty or other explicit agreement, but rather, from custom – that is, based on the general and consistent *practice of states*.

And this is where things get a bit tricky, and where there is a heightened risk of the *misuse* of international law. In the world of treaties, there is a sharp break between the political stage, leading up to ratification, and the legal stage, that may take place in a U.S. court if a treaty creates individual rights.³² On the other hand, because customary international law

³¹ See U.S. Senate, *Treaties Approved by the Current Congress*, available at http://www.senate.gov/pagelayout/legislative/one_item_and_teasers/trty_rtf.htm.

³² See, e.g., *Edye v. Robertson* (The Head Money Cases), 112 U.S. 580, 598 (1884) (noting that a “treaty is primarily a compact between independent nations” and “depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it”); *United States v. Emuegbunam*, 268 F.3d 377, 389 (6th Cir. 2001) (“As a general rule . . . international treaties do not create rights that are privately enforceable in the federal

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is generally not codified in any instrument that one can look to for an indication of a nation-state's formal consent, it is easy for courts and commentators to ignore altogether the role of consent and to blur political questions with legal ones.

I suggest that consent lies at the heart of the making of customary international law, just as it does with respect to treaty-based law. The difficulty lies in reconciling this bedrock principle of consent with the fact that customary international law is a species of "common law," in which judges must discern or identify what the law is.

How does a state consent to customary international law when there exists no piece of paper to sign and ratify? It does so by affirmative policy decisions, actions, and practices in the international arena indicating intent to be bound. In order for a practice to be considered customary international law, states must universally engage in that practice out of *opinio juris*—that is, out of a sense of *legal obligation* rather than merely as an act of courtesy or grace.³³ Put differently, customary international law consists of "those clear and unambiguous rules by which States universally abide, or to which they accede, out of a sense of legal obligation and mutual concern"³⁴

It is perhaps possible, though highly unusual, for a rule of customary international law to be restated in a mere declaration or pronouncement by a group of countries—for example, a resolution of the U.N. General Assembly or some international conference. Contrary to common misconception, the General Assembly is *not* a law-making body;³⁵ and

courts."); *United States v. De La Pava*, 268 F.3d 157, 164 (2d Cir. 2001) (noting the "strong presumption against inferring individual rights from international treaties"); *see also supra* note 20 (discussing the ICCPR).

³³ *See, e.g., Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 307-08 (2d Cir. 2000) ("Customary international law results from a general and consistent practice of states followed by them *from a sense of legal obligation*." (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 102(2) (1986) (internal quotation marks omitted) (emphasis added))).

³⁴ *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 252 (2d Cir. 2003) (citing CLIVE PARRY, *THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW* 2 (1965)).

³⁵ *See* 1 *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 248, 258, 269 (Bruno Simma ed., 2d ed. 2002) (describing the rejection of proposals to accord General Assembly resolutions the power to bind member States); D.W. BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* 41 (3d ed. 1975) (cautioning that "any attempt to draw analogies with a national assembly, parliament or legislature, is apt to be dangerous" and recognizing that General Assembly resolutions may "become evidence of international law" only "indirectly" and only if they "embody a consensus of opinion about what the law is"). *See generally Flores*, 414 F.3d at 259-61 ("Because General Assembly documents are at best merely advisory, they do not, on their own and without proof of uniform state practice . . . evidence an intent by member States

whether such a statement or resolution—by the General Assembly or by any multinational organization that does not have the power to make law—accurately reflects a body of “customary international law” will depend on whether the pronouncement or declaration accurately represents the actual practice of states in their relations with one another.

General Assembly resolutions and aspirational proclamations of international conferences, no matter how often repeated, are not in themselves a source of binding international norms. As noted, “international agreements . . . despite their moral authority, have little utility. . . .” in defining customary international law.³⁶ To put the matter more simply and bluntly, zero multiplied 100 times is zero.

Many factors would have to be considered by an observer or judge in deciding whether a certain pronouncement by a large number of countries is an authentic statement of a rule of law—including the specificity with which the principle is articulated; how many and which states have agreed to the relevant principle; and what, if any, tangible action the states have taken over time to implement the principle.³⁷

As you might guess from this description, customary international law has a “soft, indeterminate character”³⁸ and this soft and indeterminate character can lead to confusion and even to the assertion of international law where none exists.

Let us take, for example, suits brought under the Alien Tort Statute (“ATS”), which states that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”³⁹ The Supreme Court has stated recently that “the law of nations” remains an “element of common law,” and that federal courts may recognize new causes of action under the ATS when they “rest on a norm of international character accepted by the civilized world and defined with a specificity

to be legally bound by their principles, and thus cannot give rise to rules of customary international law.”).

³⁶ See *Sosa*, 542 U.S. at 734-35 (holding that provisions of the Universal Declaration on Human Rights and ICCPR do not create binding standards of customary international law).

³⁷ See I OPPENHEIM’S INTERNATIONAL LAW, *supra* note 10, at 26-27 (“[T]he substance of this source of international law is to be found in the practice of states. The practice of states in this context embraces not only their external conduct with each other, but is also evidenced by such internal matters as their domestic legislation, judicial decisions, diplomatic despatches, internal government memoranda, and ministerial statements in Parliaments and elsewhere.”). See generally *Flores*, 414 F.3d at 256-57.

³⁸ LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 29 (1995).

³⁹ 28 U.S.C. § 1350 (2000).

comparable to the features of . . . 18th-century paradigms. . . .” such as piracy and the infringement of the rights of ambassadors.⁴⁰

Even with this guidance from the Supreme Court, parties to litigation may disagree over whether a particular rule of customary international law exists, and therefore whether it can legitimately form the basis for a legal action. In the event of such a dispute, the role of a judge is to ascertain first whether a rule of customary international law in fact exists. Secondly, if such a norm can be said to exist, a judge or jury must decide whether a party to the lawsuit has violated that law through its conduct.

There are obvious challenges and dangers here – inherent in the role thrust upon judges to find or discern rules of law based on the examination of customary international practices or norms. Although this style of common law adjudication may be familiar in our domestic law, it can have consequences greater than the “interstitial” development of a state’s common law of torts and contracts with which we are all familiar.⁴¹

Because many judges are unfamiliar with the rarefied and obscure particulars of international law, they understandably look to the work of academic commentators on international law for guidance. Indeed, it has long been understood that the writings of publicists – that is, jurists and academics – are an accepted source of customary international law, albeit a secondary or subsidiary source of that law.⁴²

Traditionally, international law scholars played a valuable role assisting courts by gathering information about the *actual* practices of states and

⁴⁰ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-25 (2004).

⁴¹ *See, e.g., Sosa*, 542 U.S. at 733 n.21 (discussing the possibility of limiting the availability of relief in ATS suits through a “policy of case-specific deference to the political branches,” and citing as an example agreement between the governments of South Africa and the United States that suits against corporations alleged to have participated or abetted in the apartheid regime would interfere with the policy behind South Africa’s Truth and Reconciliation Commission). As famously expressed by Justice Holmes, “judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.” *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

⁴² *See* Statute of International Court of Justice, art. 38, 59 Stat. 1055, 1060, June 26, 1945, U.S.T.S. 993 (describing “judicial decisions and the teachings of the most highly qualified publicists . . . as subsidiary means for the determination of rules of law” (emphasis added)); CLIVE PARRY, *THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW* 2 (1965) (noting that recourse may be had to secondary sources such as “unilateral declarations, instructions to diplomatic agents, laws and ordinances, and, in a lesser degree, to the writings of authoritative jurists,” as evidence of the “acts” and “practice[s]” of states (emphasis added)); *see also* Remarks of Jack L. Goldsmith, Panel Discussion, *Scholars in the Construction and Critique of International Law*, 94 AM. SOC’Y INT’L L. PROC. 317, 318-19 (2000).

providing that information in the form of reliable secondary sources.⁴³ That sort of scholarship generally exhibited a descriptive, positivist – and indeed, what we might call an “empirical” – approach to international law; the scholars sought to provide accurate accounts of the practices of states. In short, the historic role of international law scholars was to identify what the rules of the game *were*.

Today, scholars of international law are often not content to be mere compilers of state practices. Instead, many scholars view their role as advocates or exponents of what the law *should be*. The problem lies in conflating this theoretical and policy-driven discourse – which may indeed influence the political branches of our government to adopt certain practices that may one day give rise to customary international law – with evidence of current laws or practices.

It was, I submit, eminently reasonable for courts in years past to rely on well-regarded positivist accounts as shortcuts for ascertaining customary international law. On the other hand, it is questionable whether the *policy* views of international law scholars have any particular relevance to the identification of norms that, by definition, can only be established by the practice of nation-states. When judges or others proclaim “international law” on the basis of the policy views of professors of international law, they are engaged, knowingly or unwittingly, in a *misuse* of the concepts of international law.

It is essential to recall, as the Supreme Court stated in 1900, that works of scholars “are resorted to by the judicial tribunals . . . *not for the speculations of their authors concerning what the law ought to be, but for*

⁴³ See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 838 (1997) (“The traditional conception of [customary international law] was that it resulted from a general and consistent practice of states followed by them from a sense of legal obligation”) (internal quotation marks omitted).

Several series of works descriptive of the international legal practices of the United States illustrate this earlier era of scholarship. See, e.g., A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES (Francis Wharton ed., 1886-87) (a U.S. Government compilation of various official United States documents pertaining to international law); A DIGEST OF INTERNATIONAL LAW (John Bassett Moore ed., U.S. Government Printing Office 1906) (same); DIGEST OF INTERNATIONAL LAW (Green Haywood Hackworth ed., U.S. Government Printing Office 1940-44) (same); DIGEST OF INTERNATIONAL LAW (Marjorie M. Whiteman ed., U.S. Government Printing Office 1963-73) (same); see also INTERNATIONAL LAW REPORTS (Hersch Lauterpacht *et al.* eds., Grotius Publications LTD) (an analogous compilation of British materials published every one to four years, formerly under the title ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES); LAW OFFICERS’ OPINIONS TO THE FOREIGN OFFICE 1793-1860 (Clive Parry ed., Gregg International 1970-73) (similar).

trustworthy evidence of what the law really is."⁴⁴ In other words, as the U.S. Court of Appeals for the Second Circuit has observed:

scholars do not *make* law, and . . . it would be profoundly inconsistent with the law-making processes within and between States for courts to permit scholars to do so by relying upon their statements, standing alone, as sources of international law. In a system governed by the rule of law, no private person—or group of men and women such as comprise the body of international law scholars—*creates* the law.⁴⁵

Yet many scholars of international law do not confine themselves to the seemingly tedious effort to report trends in state behavior. Instead, they adopt a normative approach, seeking to persuade courts to identify particular rules that comport with their own normative views.⁴⁶ These asserted rules may not necessarily reflect the *actual* state of customary international law. Thus, these scholars make the mistake of conflating “the normative” with “the normal.” That is to say, rather than seeking to discover “the normal” practice of sovereigns, they approach customary international law as an inquiry into “the normative” preferences of educated legal elites.

The phenomenon of scholars attempting to *shape* law by purporting to *identify* existing law is not, of course, unique to international law. It is a natural consequence of producing scholarly articles and books, and it is also the result of efforts by “private legislatures,” such as the American Law Institute (“ALI”), to “restate” the law. Indeed, the proclaimed purpose of the ALI, it will be recalled, is to “promote the clarification and simplification of the law and its better adaptation to social needs.”⁴⁷ In the realm of

⁴⁴ The Paquete Habana, 175 U.S. 677, 700 (1900) (emphasis added).

⁴⁵ United States v. Yousef, 327 F.3d 56, 102 (2d Cir. 2003); see also *id.* at 101-02 (discussing Professor Louis B. Sohn’s claim that “international law is made, *not by states, but by ‘silly’ professors writing books*”) (quoting Louis B. Sohn, *Sources of International Law*, 25 GA. J. INT’L & COMP. L. 399, 399, 401 (1996)).

⁴⁶ Two leading commentators have suggested that “a major generational change is underway” in the international law academy. Jack Goldsmith & Eric A. Posner, *The New International Law Scholarship*, 34 GA. J. INT’L & COMP. L. 463, 465 (2005-2006). This “New International Law Scholarship,” which appears to cut across traditional political boundaries, “distinguish[es] normative and positive claims,” focuses on empirical scholarship, downplays doctrinalism, and is “influenced by social scientific theory and, especially, rational choice theory.” *Id.* at 482-83.

⁴⁷ THE AMERICAN LAW INSTITUTE, CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS 1 (2001) (quoting the ALI’s 1923 Certificate of Incorporation); see also Harvey S. Perlman, *The Restatement Process*, 10 KAN. J.L. & PUB. POL’Y 2, 2-3 (2000); Alan

international law, as in other areas of the law, restatements are not merely efforts to “restate” the law as it exists; in fact, the ALI explicitly instructs the reporters of its various restatements that they are “not compelled to adhere to . . . a preponderating balance of authority but [are] instead expected to *propose the better rule* and provide the rationale for choosing it.”⁴⁸

The effort to identify what the ALI calls the better rule is, by definition, a political enterprise, in which competing perspectives, personalities, and factions vie for the favorable final verdict of a self-selected elite.⁴⁹

The Restatement (Third) of the Foreign Relations Law of the United States (“Restatement (Third)”) is especially interesting because it is an attempt by the ALI to codify a body of law for a realm that does not have the advantage of an authoritative legislature⁵⁰ or a court whose decisions have the force of binding precedent.⁵¹ The innovations of the Restatement (Third) on the subject of customary international law have been, to put the matter mildly, controversial. For instance, the Restatement (Third) suggests that customary international law might trump prior inconsistent statutory law.⁵²

Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 596 (1995) (explaining that restatements “are sets of rules, organized by subject matter, the content of which is partly a function of the case law but also is a function of the ALI’s collective view respecting which legal rules are normatively desirable for courts to apply”).

⁴⁸ THE AMERICAN LAW INSTITUTE, CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS 5 (2005) (internal quotation marks omitted) (emphasis added).

⁴⁹ *Id.* The ALI, a “self-perpetuating organization of lawyers, judges, and academics,” Schwartz & Scott, *supra* note 47, at 596, is a selective “private law-reform group that chooses its own members,” *id.* at 600; *see also id.* at 597 (arguing that the ALI “produces clear, bright-line rules that confine judicial discretion commonly when and because dominant interest groups influence the process” and that “[t]hese bright-line rules ordinarily advance the interest group’s agenda”).

⁵⁰ *See supra* note 35 and accompanying text (illustrating the lack of a centralized system of enforcement in international law).

⁵¹ *See, e.g.,* The Statute of the International Court of Justice, June 26, 1945, art. 59, 59 Stat. 1055, 1062, 3 Bevans 1153, 1190 (“The decision of the Court has no binding force except between the parties and in respect of that particular case.”); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 cmt. b (1987) [hereinafter RESTATEMENT (THIRD)] (commenting that the “traditional view that there is no *stare decisis* in international law”); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN L. REV. 429, 482 (2003) (noting that “even *within* a single international court there is often no system of binding precedent and no doctrine of *stare decisis*,” and concluding that “[t]he refusal to treat precedents as binding is a long-entrenched practice in international adjudication that stems from the origins of the international judicial system in the ad hoc arbitral courts of the nineteenth century”).

⁵² *See* RESTATEMENT (THIRD), *supra* note 51, § 115(2) & cmt. d & Reporters’ Note 4. Comment d states that “[i]t has . . . not been authoritatively determined whether a rule of customary

Some commentators have called the Restatement (Third)'s view that customary international law could supersede federal statutory law "pure bootstrapping," noting that the only authority cited for that proposition in the Restatement (Third) is a single law review article by the Restatement (Third)'s own Reporter, which in turn merely cites an earlier draft of the Restatement (Third) – that is, the position is without external authority.⁵³

Because the Restatement (Third) itself proclaims that certain of its positions are "at variance"⁵⁴ with the practice and customs followed by the United States in its international relations and incorrectly asserts that customary international law may trump United States statutory law, a decision of the Court of Appeals for the Second Circuit has suggested that courts be vigilant and careful in considering the Restatement (Third), or other similar scholarship, as evidence of the customs, practices, or laws of the United States and/or evidence of customary international law.⁵⁵

The Restatement (Third)'s proposition that customary international law can preempt or trump domestic legislation is without foundation or merit. It is also at odds, I believe, with Supreme Court precedent. In the seminal case of *The Paquete Habana*,⁵⁶ the Supreme Court stated:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, *where there is no treaty and no controlling executive or legislative act or judicial decision,*

international law that developed after, and is inconsistent with, an earlier statute or international agreement of the United States should be given effect as the law of the United States."

⁵³ Bradley & Goldsmith, *supra* note 43, at 835-36 & nn.142-43; see also Michael Traynor, *That's Debatable: The ALI as a Public Policy Forum, Part II*, 25 THE ALI REPORTER, 1, 2 (2002) (noting that the rule was much debated when the Restatement (Third) was under discussion in the Institute and is not completely free from controversy now).

⁵⁴ The Director of the ALI notes in the foreword to the Restatement (Third) that it is "in no sense an official document of the United States," and that "[i]n a number of particulars the formulations in this Restatement are at variance with positions that have been taken by the United States Government." RESTATEMENT (THIRD), *supra* note 51, at IX. These variations presumably are intentional because, although the ALI extended the Restatement (Third) project by a year to consider "communications received . . . from the Department of State and from the Justice Department," it did not fully conform the Restatement to the positions expressed in those communications. American Law Institute, Proceedings, 63d Annual Meeting, 1986, at 90 (1987).

⁵⁵ U.S. v. Yousef, 327 F.3d 56, 99-100 & n.31 (2003).

⁵⁶ 175 U.S. 677 (1900).

resort must be had to the customs and usages of civilized nations⁵⁷

The Supreme Court's instruction to "resort to" customary international law only in the absence of a "treaty . . . [or] controlling executive or legislative act or judicial decision" reveals a remarkable sensitivity to the nuanced role that consent plays in international law. The Court understood that, in abiding by customary international law, which ultimately relies on policy and practice (implicitly reflecting the consent of the governed), the United States adheres to its democratic principles.⁵⁸ But the Court also realized that—because determination of that consent depends on the judiciary's assessment of difficult-to-discern practices and attitudes worldwide, often filtered through secondary sources that might lapse into speculation—courts should not risk overturning a clearer manifestation of those democratic principles embodied in already-existing domestic law.

To put the matter another way, precisely because of the comparative difficulty of ascertaining the content of customary international law, courts run a particularly heightened risk of undue reliance on the normative views of academic commentators when they are called upon to determine whether there has been a violation of international law. Most significantly, courts may be asked to apply, as part of domestic law, norms to which the United States has not consented or, indeed, obligations the United States has explicitly avoided, rejected, or disavowed.

⁵⁷ *Id.* at 700 (emphasis added). It is illuminating that commentators citing to *The Paquete Habana* "generally end at [the first] sentence and go on to assert far-ranging claims for application of international law in U.S. courts." Laurence E. Rothenberg, *International Law, U.S. Sovereignty, and the Death Penalty*, 35 GEO. J. INT'L L. 547, 560 (2004); see also Sanchez, *supra* note 7, at 196-97; see also JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 7 (1996); Koh, *supra* note 6, at 43.

⁵⁸ The Court has further indicated its regard for customary international law by holding that a statute "ought never to be construed to violate the law of nations if any other possible construction remains." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 452 n.14 (White, J., dissenting). This interpretive principle was articulated in *MacLeod v. United States*, 229 U.S. 416, 434 (1913):

The statute should be construed in the light of the purpose of the government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to violate the obligations of this country to other nations, which it was the manifest purpose of the President to scrupulously observe, and which were founded upon the principles of international law.

Yet even here, the Court does not suggest that a statute can be discarded when a court identifies or recognizes a new rule of customary international law. Allowing courts to nullify statutes in such a manner would do violence to the view that "judges do and must legislate, but they can do so only interstitially. . . ." *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

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A related question is the growing popularity of invocations of so-called peremptory norms of international law, also known as *jus cogens* norms. In essence, a peremptory norm is one that is so fundamental that it binds a state, even if the state explicitly declines to accept the norm. The paradigmatic examples of *jus cogens* norms are collective understandings that genocide and slavery should be prohibited.⁵⁹

As one well-known scholar of international law has stated, “there is no scholarly consensus on the methods by which to ascertain the existence of a peremptory norm, nor to assess its significance or determine its content.”⁶⁰ This indeterminacy invites “development” or expansion that ignores the basic principle that a *jus cogens* norm must be based on “authentic systemic consensus” that includes “all the essential components of the international community.”⁶¹ Since the United States is surely an “essential component of the international community,” it would seem impossible for a new or additional *jus cogens* norm to exist that has not been recognized at any point in the history of U.S. foreign relations or which contradicts the foreign relations practices of the United States.

Nevertheless, some scholars wishing to help create international law obligations without regard to the political processes of nation-states have come to regard the concept of the peremptory norm, or *jus cogens* norm, as a useful wellspring for the effectuation of a host of domestic policy goals. The result has been a proliferation of claimed new peremptory norms, or expansive definitions of the concept of established *jus cogens* norms, some of which have been the basis of claims in domestic lawsuits.⁶²

⁵⁹ See generally L. OPPENHEIM'S INTERNATIONAL LAW, *supra* note 10, at 7-8 (“States may, by and within the limits of agreement between themselves, vary or even dispense altogether with most rules of international law. There are, however, a few rules from which no derogation is permissible.”).

⁶⁰ M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 L. & CONTEMP. PROBS. 63, 67 (1996) (“Scholars also disagree as to the means to identify the elements of a peremptory norm, to determine its priority over other competing or conflicting norms or principles, to assess the significance and outcomes of prior application, and to gauge its future applicability in light of the value - oriented goals sought to be achieved.”)

⁶¹ LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 39 (1995) (quoting 2 Y.B. INT'L L. COMM. 119 (1976)).

⁶² See, e.g., *Hain v. Gibson*, 287 F.3d 1224, 1243-44 (10th Cir. 2002) (“ [T]here appears to be no basis for granting . . . federal habeas relief on the grounds that imposition of the death penalty for crimes committed while a juvenile would violate *jus cogens* norms of international law.”); *Buell v. Mitchell*, 274 F.3d 337, 373-74 (6th Cir. 2001) (rejecting argument that imposition of the death penalty alone is a violation of *jus cogens* norms); *Gisbert v. U.S. Atty Gen.*, 988 F.2d 1437, 1448 (5th Cir. 1993) (rejecting claim that detention of excludable aliens whose native country would not accept them back was a violation of *jus cogens* norms).

In other words, the lack of a rigorous methodology for determining *jus cogens* norms creates the following phenomenon: Advocates unable to achieve particular policy objectives in American political arenas seek to achieve their policy objectives by securing pronouncements of international forums that purport to announce new or expanded peremptory norms so that these norms may, in turn, be invoked in our courts. The effect of this end-run around our political institutions is that the source from which *jus cogens* norms derive their enduring strength—universal consensus that, once established, becomes non-derogable—is no longer part of the process of making law.

The potential list of peremptory norms is apparently limited only by the imagination of those who would prefer a more robust set of legal restrictions on state behavior.⁶³ However, not all unpopular or even deplorable conduct violates international law.⁶⁴ Peremptory norms represent an *exception* to the basic rule that international law is based on the continuing consent of nation-states—and great expansions of the exception could threaten to swallow the rule. The further that peremptory norms move away from the fundamental threats to international peace and security that form the core of *jus cogens*, such as genocide and slavery, the less regard countries may have for that core.⁶⁵

⁶³ See, e.g., Justin D. Cummins, *Invigorating Labor: A Human Rights Approach in the United States*, 19 EMORY INT'L L. REV. 1, 40-41 (2005) (speculating that the “doctrine of *jus cogens* provides a potentially powerful path for prosecuting Civil-and Political-Covenant claims, and it could be a more effective vehicle than the [ATS] and Section 1983 combined,” and concluding that the doctrine “plainly should apply” to “the right to unionize and other crucial labor protections. . . .”); Ladan Askari, *Girls’ Rights Under International Law: An Argument for Establishing Gender Equality as a Jus Cogens*, 8 S. CAL. REV. L. & WOMEN’S STUD. 3, 8 (1998) (“The set of established peremptory norms . . . can be extended to include a prohibition of gender discrimination.”). I cite these examples not in any way to discourage furthering the interests addressed in the above articles, but to show that the connection between proposed expansions of *jus cogens* norms and the traditional principles behind such norms, such as universality and specificity, is not always clear.

⁶⁴ As Judge Friendly observed:

We cannot subscribe to [the] view that the Eighth Commandment “Thou shalt not steal” is part of the law of nations. While every civilized nation doubtless has this as a part of its legal system, a violation of the law of nations arises only when there has been “a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*.”

IIT v. Vencap, LTD, 519 F.2d 1001, 1015 (2d Cir. 1975) (quoting *Lopes v. Schroder*, 225 F. Supp. 292, 297 (E.D. Pa. 1963)); see also *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 249-50 (2003).

⁶⁵ See Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 537-38 (2002):

Because principles of customary international law generally, and *jus cogens* norms in particular, are difficult to identify, they are vulnerable to manipulation. In determining customary international law, judges increasingly are asked to rely on asserted “international opinion” drawn from the domestic political trends in some preferred states rather than the universal, actual practice of states in their relations with one another. In addition, some commentators try to shape or direct the law by asserting supposed rules of customary international law that are grounded in vague pronouncements by international organizations or foreign tribunals rather than in the specific international practices of nation-states.

I do not suggest that academic students of international law should not play a role in the development of the law or legal institutions; quite the contrary. Nor do I take issue with judges who, in good faith, look to academic writings and adopt the interpretations of particular scholars when identifying and applying customary international law to real-world disputes. But all of us, especially judges, should be wary of normative scholarship in an area of the law that is supposed to be based on the consent and actual practices of nation-states.

The *misuse* of international law will invariably lead to cynicism and breed resistance to the very idea of international law, giving credence to the criticism of international law noted by Isaiah Berlin, that international law simply “does not exist.”⁶⁶

We rely upon the rigor of the common law style of adjudication and the integrity of our judges to prevent the *misuse* of customary international law. None of us should wish to live under a law that is merely a statement of the personal preferences or visions of justice of tenured law professors or tenured judges. A claim under customary international law asserted in our courts should only be based on a violation of “well-established, universally recognized norms” governing relations between states.⁶⁷ To preserve the integrity of customary international law, we must strive to find it in a

As a normative matter, it may be difficult to justify the placement of capital punishment for sixteen- and seventeen-year-old murderers in the same category as genocide, slavery, and torture. Indeed, there is a danger that the “shock the conscience” nature of the *jus cogens* concept will be undermined by expanding the category in this way. Although this observation obviously depends to some extent on a subjective assessment, the behavior of nations appears to bear it out.

Id. For examples of cases where courts rejected expansive *jus cogens* norms, see *supra* note 62.

⁶⁶ See Szasz, *supra* note 2, at 60.

⁶⁷ *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995) (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980) (internal quotation marks omitted)).

“rigorous, systematic, or legal manner,” and we must avoid the assertion of “rules” of customary international law that are supported only by “amorphous, general principles.”⁶⁸

As a general rule, international law, in its various manifestations, rests on the consent of sovereign nation-states. Customary international law is comprised of the well-established, universal practices of sovereign nation-states in their relations with one-another, not merely practices universally adopted by states.⁶⁹

If customary international law becomes completely unmoored from the basic principle of consent by sovereign states in their relations with one another – in other words, if it becomes wholly detached from the idea of consent of the governed – it risks losing legitimacy.

If courts abandon the principle of consent, and find law where none exists – for example, on the basis of views of scholars or the recurring proclamations of public and private organizations not expressly authorized by treaty to make law – the result is predictable: our elected officials will seek to regain their rightful roles as the makers of foreign policy and the representatives of the popular will. The very idea of customary international law may be discredited, and the talismanic defense of “judicial independence” will then ring hollow.

Those who wish the United States well in an international system based on law should be especially anxious to assure that international law is not brought into disrepute by its misuse. Americans across the political spectrum, Democrats and Republicans alike, treasure the survival of the United States as a sovereign and independent country. And if historical circumstance and fortune have made the United States a world power with friends and allies that deserve our support and protection, it is likewise clear that Americans wish it to be so.

If the United States is to remain, in Lincoln’s words, “the last, best hope of earth,”⁷⁰ we should happily recognize that the international legal obligations enforced against the United States, or successfully asserted by litigants in the courts of the United States, are generally those legal obligations that the United States has freely assumed in its relations with

⁶⁸ *Flores*, 414 F.3d at 252 (citing *Filartiga*, 630 F.2d at 884 and *Hilao v. Estate of Marcos* (*In re Estate of Ferdinand Marcos, Human Rights Litig.*), 25 F.3d 1467, 1475 (9th Cir. 1994)).

⁶⁹ See *supra* note 64.

⁷⁰ Abraham Lincoln, Annual Message to Congress (Dec. 1, 1862), in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 688 (Roy P. Basler ed., 1946).

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other states—those legal obligations to which the United States has knowingly consented—under its democratic system of government.