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REVISITING *VAN GEND EN LOOS*

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The United States:
Use, Non-Use, and Abuse of International Law in the U.S. Legal Order

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Prologue:
Revisiting *Van Gend En Loos*

Fifty years have passed since the European Court of Justice gave what is arguably its most consequential decision: *Van Gend en Loos*. The UMR de droit comparé de Paris, the European Journal of International Law (EJIL), and the International Journal of Constitutional Law (I•CON) decided to mark this anniversary with a workshop on the case and the myriad of issues surrounding it. In orientation our purpose was not to 'celebrate' *Van Gend en Loos*, but to revisit the case critically; to problematize it; to look at its distinct bright side but also at the dark side of the moon; to examine its underlying assumptions and implications and to place it in a comparative context, using it as a yardstick to explore developments in other regions in the world. The result is a set of papers which both individually and as a whole demonstrate the legacy and the ongoing relevance of this landmark decision.

My warmest thanks go to the co-organizers of this event, Professor Hélène Ruiz Fabri, Director of the UMR de droit comparé de Paris, and Professor Michel Rosenfeld, co-Editor-in-Chief of *I•CON*.

JHHW

THE UNITED STATES:
USE, NON-USE, AND ABUSE OF INTERNATIONAL LAW IN THE U.S. LEGAL ORDER

By Barry E. Carter*

The United States today generally supports international law, as well as associated international and regional institutions. There are, however, continuing exceptions and even some recent abuses.

The present approach of the United States and its legal system to international law can be traced in part to the early days of the country, though the post-World War II period has been particularly formative.

Enduring beliefs and attitudes had developed in the United States by the period after the 13 American colonies declared independence from England in 1776 and fought a seven-year Revolutionary War against the British and their Indian allies. These beliefs and attitudes, sometimes in tension with one another, would help shape the new country and its legal system—and continue to have influence today.

First, there were both strong insular and international views. Most Americans were focused inward on their new country and its vast frontier that awaited exploration and settlement. Many of these Americans had fled from difficult situations in Europe and wanted to avoid being involved in any disputes there.

At the same time, the United States had gained its independence with important military support from a European ally, France, including when a French fleet helped blockade Lord Cornwallis and his forces at Yorktown. The country was also actively involved in trading goods with European colonies in the Caribbean and with Europe. Indeed, when President Thomas Jefferson persuaded Congress to enact a comprehensive trade embargo in 1807 that prohibited American ships from leaving for

* Professor of Law and Director of the Center on Transnational Business and the Law, Georgetown University Law Center. The author notes the valuable assistance provided by his student research assistants, Benjamin Gelfand and Jesse Overall. This paper was initially commissioned for a June 2013 Workshop at the Sorbonne Law School on "Revisiting Van Gend en Loos," sponsored by the European Journal of International Law, the International Journal of Constitutional Law, and the Sorbonne's UMR de Droit Comparé de Paris. The paper benefits considerably from the many comments received from Workshop participants, including from one of its organizers, Joseph Weiler, and from Vivian Curran and Enzo Cannizzaro. I also appreciate the very insightful and helpful comments from my Georgetown Law colleagues, David Koplow and David Stewart.

foreign ports and that banned the carriage of U.S. goods by other ships in hopes of avoiding war with England or France, virulent U.S. domestic opposition ended the embargo in 1809.

Second, there was a strong strain of what some today call "exceptionalism." The revolution and the new country's embrace of democracy and of individual rights led many Americans, whether they had insular or international views, to believe that the United States was special. As Thomas Paine, a fiery activist of the times, wrote: "The cause of America is in a great measure the cause of all mankind. . . . The sun never shined on a cause of greater worth."[1]

Third, there was considerable support for both a strong federal government and for protecting individual rights. After the United States found that its first experiment with a weak national government under the Articles of Confederation led to serious problems, a Constitutional Convention in 1787 agreed to a new Constitution with a stronger federal government with greater and more clearly defined powers, including in trade and foreign affairs.

Yet, individual rights were valued so highly that seven of the original ratifying states did so with understandings that explicit protections of these rights would be added to the Constitution. In 1791, the first 10 amendments, often called the Bill of Rights, were ratified, providing protections for people and limiting the federal government.

The Constitution and the Bill of Rights also reflected two other views at the time that continue through today. There was a concern that the federal government might become too strong relative to the states and individuals. So, the Tenth Amendment reserved some unspecified powers to the states as well as the people.[2] The resulting "federalism" that emerged from the Bill of Rights and Constitution has on occasion created questions about the scope of the federal government's powers in foreign affairs.[3]

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[1] Thomas Paine, COMMON SENSE (1776), *reprinted in* 1 THE WRITINGS OF THOMAS PAINE 68, 84 (Moncure Daniel Conway eds., G.P. Putnam and Sons 1894).

[2] The Tenth Amendment provides that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[3] *E.g.*, American Insurance Ass'n v. Garamendi, 539 U.S. 396 (2003) (a 5-4 decision striking down a California law, the Holocaust Victim Insurance Relief Act of 1999, that imposed reporting requirements on insurance companies who had done business in Europe between 1920-1945, because of preemption by the federal government).

Another view besides federalism that was made the law of the land in the Constitution was that there should be a separation of powers in the federal government, in part to prevent any one individual from becoming too powerful. Each of the three branches of government (the Executive, Congress, and Judiciary) was allocated powers in the area of international relations and foreign affairs. This has meant, for instance, that the President might recognize a new state and government on his own initiative or enter into international agreements within his powers without the approval of Congress. On the other hand, one branch of the federal government might block the initiatives of another. For example, Congress might use its power of the purse to block a Presidential initiative by declining to fund activities that fall within the many other powers of Congress, or the Senate might decline to advise and consent to a treaty that the President has signed. And, the Judiciary might interpret or even void a law passed by Congress and signed by the President.

Although this paper will further discuss some of these beliefs and attitudes of Americans in the country's early years, especially because of their impact on the resulting U.S. legal system, the focus will be on the post-World War II period, particularly the 12 years since the Al Qaeda attacks against the United States on September 11, 2001.

Many international law issues have arisen in the post-World War II period and they cannot all be adequately addressed in this article. It might be especially instructive to look at developments regarding the two key sources of international law—(1) treaties and other international agreements, and (2) customary international law—as well as (3) the evolving institutional architecture for creating, implementing, and enforcing international law. Also instructive as case studies are the developments in the important and high-visibility areas of (4) jurisdiction and economic sanctions, (5) drones, and (6) the treatment of suspected terrorists.

1. Treaties and Other International Agreements

Treaties and other international agreements are one of the primary sources of international law, with these specific arrangements increasingly displacing customary

law (which will be discussed in the next section).[4] This is true for the United States, which has entered into thousands of international agreements.

Unlike the European Economic Community's Treaty of Rome, signed in 1957, which did not have a Supremacy Clause, the U.S. Constitution contained an explicit Supremacy Clause that included "all Treaties." Article IV, section 2, reads in full:

> 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 should be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The reason for including treaties as the law of the land was to "show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure [their] performance no longer nominally, for the judges of the Unites States will be enabled to carry [them] into effect."[5] This inclusion of treaties was specifically designed to solve one of the perceived weaknesses of the Articles of Confederation. The Articles had given Congress the power to conclude treaties, but had not provided a mechanism for enforcing them under domestic law.[6]

Two-thirds vote requirement. At the same time that the Constitutional Convention was ensuring that the federal government had the power to enforce treaties, it made entering into them difficult. Article 2, section 2, of the Constitution provided that the U.S. President "shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. . . ." The founders considered the treaty power one of great importance, too important to entrust to either the President alone, or to the popularly elected House.

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[4] See, e.g., STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38(1); RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (THIRD) [hereinafter referred to as the *Restatement (Third)*], sect. 102. As indicated in the *Restatement (Third)*, section 301 comment: "The terminology used for international agreements is varied. Among the terms used are: treaty, convention, agreement, protocol, covenant, charter, statute, act, declaration, ... "

[5] 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 490 (photo reprint 1987)(Jonathan Elliot ed., 2d ed. 1888) (statement of James Wilson), quoted in Carlos Manuel Vázquez, "Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties," 122 HARV. L. REV. 617 (2008).

[6] Vázquez, *supra*.

The two-thirds requirement, rather than a majority vote, was included because the states wanted to make it more difficult for the territorial rights of individual states or regions to be given away by the nation as a whole.[7]

This two-thirds voting requirement (or 67 votes if all 100 Senators are present) has become a significant hurdle in recent years to obtaining the advice and consent of the U.S. Senate. In contrast, regular legislation or the confirmation of senior government officials (including Cabinet officers, Supreme Court Justices, and ambassadors), requires only a majority vote, though in recent years the political party in the minority has increasingly threatened a filibuster, which requires 60 votes to end debate. Sixty is still relatively easier than 67 votes, especially when the Senate's party makeup is narrowly divided now at 52 Democrats, 46 Republicans, and 2 Independents who usually vote with the Democrats.

A continuing example of the hurdle created by the 2/3 voting requirement is the 1982 Law of the Sea Convention (LOS Convention) and the companion 1994 Agreement Relating to Implementation of the LOS Convention. As of August 2013, the Convention had 166 parties and the Agreement had 145. The United States has not ratified either treaty.

Since the 1994 Agreement, U.S. domestic support for the two treaties has grown and includes the U.S. Navy, multinational corporations, environmental groups, and a 16-member Commission on Ocean Policy appointed by President George W. Bush. However, President Reagan's objections in 1982 to certain provisions of the treaty included an emphasis on sovereignty and avoiding strong international institutions. His opposition lingers in the minds of some conservatives, even though Reagan's objections are arguably resolved in every significant respect by the 1994 Agreement. Hence, even after the second Bush Administration supported the treaties and the Senate Foreign Relations Committee, chaired then by moderate Republican Senator Lugar, voted 17-4 in 2007 to recommend that the full Senate give its advice and consent, Senate leaders

[7] For example, in 1786, there had been a split between seven Northern and five Southern states over a proposed arrangement with Spain regarding navigation rights to the Mississippi for 25 years. Similarly, the Northern delegates to the Convention were concerned about fishing rights off Newfoundland. See, e.g., R. Earl McClendon, "Origin of the Two-Thirds Rule in Senate Action on Treaties, 36 AM. HIST. REV. 768, 769 (1931).

have hesitated to bring the treaties to the floor for a vote, apparently because of the difficulty of obtaining the necessary 2/3 vote.[8]

Obligations under international law. International law and U.S. law[9] are both clear that the United States is bound internationally if it has ratified and become a party to a treaty (or other international agreements). It would appear that the United States has usually complied with the treaties it is a party to, in part because of the general U.S. support for the rule of law as well as the U.S. interest in or commitment to the specific provisions of the treaty.

There can be arguments, though, over whether the United States was or is in compliance on occasions when the treaty's provisions are unclear or the dispute resolution system is weak, leaving countries to argue over compliance. In addition, there have been some situations where the United States was slow to comply, such as its slow response to the decision of the World Trade Organization's dispute resolution system that the U.S. tax treatment for U.S. foreign sales corporations was inconsistent with the WTO treaty.[10]

There have also been situations where the United States has not complied with a treaty. For example, as will be discussed in the section on sanctions, the United States

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[8] A very recent victim of the 2/3 voting requirement is the Convention on the Rights of Persons with Disabilities, which is in force and has 130 parties, but not the United States. The Senate Committee on Foreign Relations had recommended by a 13-6 vote that the full Senate give its advice and consent to ratification of the treaty. The committee noted that the Convention would do little to affect the lives of disabled persons in the United States because the treaty's requirements are met or exceeded by existing U.S. law in most cases. However, ratification would improve U.S. citizens' ability to travel abroad, and it would place the United States in a better position to advocate for disabled persons around the world. To the extent that the Convention had some ambiguities and there were some questions, the Senate committee's recommendation included three reservations, eight understandings, and two declarations. They were designed in part to eliminate concerns that the treaty might threaten individual rights.

When the Convention came to the Senate floor for a vote in November 2012, the opposing Republican Senators resorted to improbable hypotheticals involving individual rights and downplayed the committee's reservations, understandings, and declarations. They invoked President Thomas Jefferson's warning in 1801 against "entangling alliances."

On November 27, the Convention failed to receive the advice and consent of the Senate by a close vote of 61 for and 36 (all Republicans) against, with 3 Senators abstaining. If this had been a regular piece of legislation or an executive agreement, the 61 votes would have been enough to prevent a filibuster and to meet the majority requirement.

[9] As Chief Justice John Roberts wrote for the majority in the Medellin case, "No one disputes that the [ICJ's] Avena decision—a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an *international law* obligation on the part of the United States." Medellin v. Texas, 552 U.S. 491, 504 (2008).

[10] This case, begun by the European Communities in 1997, was not finally resolved until 2006. Note though that other countries have also been slow to comply on occasions. The European Communities, for example, were slow to correct their activities in the WTO cases involving bananas and hormones.

has sometimes tried to impose sanctions laws on a foreign subsidiary of a U.S. company when the United States has an existing treaty with the country where the subsidiary has been incorporated and is located, say in the Netherlands, and the treaty recognizes that the company is deemed a company where it has been incorporated.[11]

Self-executing vs. non-self-executing treaties. A relevant U.S. domestic law consideration is the distinction between self-executing treaties, which become domestically enforceable federal law upon ratification, and non-self-executing treaties, which only become domestically enforceable through legislation passed by Congress.

Although the U.S. Supreme Court has long recognized this distinction, the courts and the U.S. government had generally considered most treaties that the United States had become a party to as self-executing, such as the long list of Friendship, Commerce, and Navigation (FCN) treaties that date from 1778 to 1968, with about 40 now in force. However, starting in the 1980s, the U.S. Executive Branch worked with the Senate to end a deadlock that had blocked for years the U.S. ratification of major human rights treaties. To obtain the necessary 2/3 vote, the Senate increased its use of reservations, understandings, and declarations when it advised and consented to a treaty, including a declaration that some or all of a treaty's provisions are "not self-executing."[12]

If existing domestic legislation does not already cover the area of a non-self-executing treaty, Congress has on occasion passed legislation to implement the treaty. It did this with the Genocide and Torture Conventions. However, if domestic legislation does not already exist and no new legislation is passed, the treaty is binding internationally on the United States, but has no domestic effect in the United States.

The U.S. Supreme Court recently addressed this question of self-executing versus non-self-executing treaties in Medellin v. Texas, 552 U.S. 491 (2008). There, a sharply-divided Court voted 6-3 to hold that the International Court of Justice's decision in Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. (Judgment of Mar.31) (*Avena*), was not directly enforceable as domestic law in a U.S. state's (Texas) court. The ICJ had held that Jose Ernesto Medellin and 50 other Mexican nationals in

[11] See also David A. Koplow, "Train Wreck: The U.S. Violation of the Chemical Weapons Convention," http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2050&context=facpub (arguing that the U.S. record of treaty compliance is not great, with several unambiguous treaty violations).

[12] U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, III (1), 138 CONG. REC. 8070 (1992).

U.S. prisons were entitled to a review and reconsideration of their state-court convictions and sentences because of violations of the Vienna Convention on Consular Relations.

Chief Justice Roberts, in his majority opinion, found that none of three treaty sources—the Optional Protocol Concerning Compulsory Settlement of Disputes to the Vienna Convention (Optional Protocol), the U.N. Charter, and the ICJ Statute—was self-executing, so they did not provide binding federal law in the absence of implementing legislation. Justice Breyer vigorously dissented, citing much history, for himself and two other Justices.

Many observers consider the majority opinion in *Medellin* a departure from the Court's past approach, switching the presumption to be in favor of finding treaties to be non-self-executing, rather than self-executing.[13] This could create a problem for past treaties that had not been interpreted by the U.S. courts. However, the uncertainty can be minimized—and often has been—for post-*Medellin* treaties by the U.S. Senate including an express declaration that a treaty is self-executing or not. For example, the U.S. Senate expressly included a declaration that a 2010 extradition treaty with the United Kingdom was self-executing.

Other agreements. Almost all the international agreements that the United States enters into qualify as "treaties" under international law, according to the Vienna Convention on the Law of Treaties, which the United States has not ratified but has accepted in substantial part as customary international law). Hence, international law rules apply to them. As discussed above, the United States has usually complied with the international treaties (or agreements) that it is a party to.

However, for understanding domestic implementation of these international agreements, it is worth noting that, in recent decades, less than 10 percent of those international agreements entered into by the United States are Article II treaties under the Constitution, which requires that the Senate has advised and consented to them by a 2/3 vote and then they have been ratified. The remaining 90-plus percent of the international agreements entered are considered "executive agreements" under domestic law.

[13] See, *e.g.*, Vazquez, *supra* note 6.

Executive agreements can be of three types: (1) an agreement based on a prior treaty under U.S. law; (2) an agreement based on congressional-executive approval; and (3) an agreement based on the President's authority alone.[14]

The first type of executive agreement is simply an extension of the treaty process, discussed above. The agreement is pursuant to a treaty brought into force with the advice and consent of the Senate, and that treaty's provisions constitute authorization for the agreement without any further action by Congress. Good examples are the status of forces agreements that the United States has entered into with its North Atlantic Treaty partners (NATO) regarding the deployments of U.S. military forces in a partner's country.

The second type of executive agreement, usually called a "congressional-executive agreement," is authorized in advance (*ex ante)*, or approved after the fact (*ex post*), by a majority of both houses of Congress and signed by the President. An example of an *ex ante* agreement is the joint resolution that authorized U.S. participation in the IMF and the World Bank. An example of an *ex post* agreement is the Congressional approval of the World Trade Organization Treaty.

The third type of agreement, usually called a "presidential executive agreement" or a "sole executive agreement," is based on the President's authority alone. He is acting without a delegation of authority from Congress. Often these agreements are for housekeeping purposes, such as postal agreements, that do not require the attention of Congress. However, on occasion, the President has utilized sole executive agreements when he felt that congressional support was not necessary or could not be obtained, if at all, in a timely fashion. The 1981 Algiers Accords between the United States and Iran that freed 50 American hostages and returned several billion dollars of frozen assets to Iran was an example of the latter.

The *Restatement (Third)* and most experts believe that congressional-executive agreements are interchangeable with Article II treaties in every instance. Sole executive agreements are the same as Article II treaties on the international law level and trump state law under the Supremacy Clause when within the President's constitutional

[14] From 1789 to 1839, the United States entered into 27 executive agreements and 60 treaties, or a ratio of 0.45:1. By 1939 to 2012, it is estimated that the United States entered into about 17,300 non-treaty international agreements, and 1,100 treaties, or a ratio of about 16:1. Michael John Garcia, Congressional Research Service, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT ON U.S. LAW 3 (2013).

powers. However, there is some question whether a sole executive agreement that is later in time than a statute (that is passed by Congress and signed by the President) has precedence over that statute if the statute is one that is within congressional powers.[15]

Why might a President choose between treating an international agreement as a domestic treaty or an executive agreement? And, if he chooses to treat it as an executive agreement, which type should he choose?

The U.S. Department of State has somewhat vague guidelines that provide no definitive answers, but indicate that considerations in choosing among the possible domestic agreements are, among others: past U.S. practice, the extent to which the agreement involves commitments or risks affecting the nation as a whole, the degree of formality desired for an agreement, the proposed duration of the agreement, and the need for prompt conclusion of the agreement.[16]

In fact, a President needs to consider whether it will be easier to obtain a 2/3 vote in the Senate for an Article II treaty or a majority vote in both houses of Congress. Also, past practice is very important, since the U.S. Senate or House might take offense if the traditional approach for, say, an arms control agreement is changed and that body is given less of a role. The past practice has been that major international agreements involving, among other matters, arms control, human rights, taxes, or climate issues have been treated as treaties under U.S. domestic law. On the other hand, recent trade agreements, such as the WTO agreement, are treated as congressional-executive agreements, in part because the House of Representatives has a great interest in trade matters which are important to constituents. Also, trade agreements often involve tariffs (which mean revenues) and the Constitution, Art. II, section 7, provides that "All Bills for raising Revenue shall originate in the House of Representatives . . . ."

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[15] *Cf.* United States v. Guy W. Capps, Inc., 204 F.2d 655, 659-660 (4th Cir. 1953) ("We think that whatever the power of the executive with respect to making [sole] executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with a regulation prescribed by Congress"), *aff'd on other grounds*, 348 U.S. 296 (1955).

[16] Department of State Circular 175, 22 C.F.R. §181.4 and at 11 U.S. Dep't of State, Foreign Affairs Manual §720 (2006).

2. Customary International Law

Customary international law is the second primary source of international law.[17] U.S. courts have accepted it "as part of our law," and the courts and the U.S. Executive Branch have used it often. However, the courts have provided for wide exceptions to its use and the Executive Branch has selectively invoked it.

A leading case on customary international law in the U.S. legal system is The Paquete Habana, 175 U.S. 677 (1900). The issue there was whether two coastal fishing vessels, flying the Spanish flag, and their cargoes were prizes of war when they were seized off the coast of Cuba by U.S. ships during the Spanish-American war. The President had issued two proclamations in April 1898. The first declared that the United States had instituted and would maintain a blockade, "in pursuance of the laws of the United States, and the law of nations applicable to such cases." The second presidential proclamation, which came after Congress declared war on Spain, said that "such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice." No mention of fishing vessels was made in the proclamations and U.S. statutory laws were apparently silent on the issue.

The majority opinion of the U.S. Supreme Court announced broadly that "International law is part of our law." However, it went on to qualify its statement:

> [International law] 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 determinations. For this purpose, 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 . . . [18]

Hence, the "customs and usages of civilized nations," which has been interpreted to mean customary international law, were applicable, but subject to major exceptions—i.e., when there was not a treaty or a controlling executive or legislative act or judicial decision.

The Court then went on to examine carefully how major countries in wartime for the prior few centuries had treated coastal fishing vessels. It found that, for about a

[17] See, *e.g.*, STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38(1); RESTATEMENT (THIRD), sect. 102.
[18] 175 U.S. at 700.

century or even more in some cases, "no instance has been found in which the exemption from capture of private coast fishing vessels, honestly pursuing their peaceful industry, has been denied by England, or any other nation." The Court concluded: "[I]t is the duty of this court, sitting as the highest prize court of the United States, and administering the law of nations, to declare and adjudge that the capture was unlawful, and without probable cause."

U.S. courts have generally followed this opinion since. There have been several cases where courts have found the *Paquete Habana* exceptions applicable and decided against the use of customary international law. For example, in Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986), the court rejected the argument that the customary international law against indefinite detention could be applied to release Cuban refugees in U.S. detention when the Attorney General had determined that their special immigration parole status had been revoked.

And, although its reasoning is not entirely clear, the U.S. Supreme Court rejected the use of "general international law principles" in a case involving the abduction of a suspected criminal from Mexico to the United States when there was an extradition treaty between the two countries and when the Executive Branch could decide to return him. United States v. Alvarez-Machain, 504 U.S. 655 (1992). Humberto Alvarez-Machain, who was suspected of being complicit in the murder of a U.S. Drug Enforcement (DEA) agent in Mexico, was forcibly kidnapped from his medical office in Mexico and flown by private plane to El Paso, Texas, where he was arrested by DEA officials. The U.S. district court concluded that DEA agents were responsible for the abduction, although they were not personally involved in it.

The majority opinion for six Justices in a sharply divided Court briefly addressed the international law issue:

> Respondent [Alvarez-Machain] and his amici may be correct that [his] abduction may be in violation of general international law principles [against international abductions]. Mexico has protested the abduction . . . through diplomatic notes, and the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch. . . . The fact of [his] forcible abduction does not therefore prohibit his trial in a

> court in the United States for violations of the criminal laws of the United States.[19]

On the other hand, there have also been several cases where the U.S. courts have used customary international law to add content to a statute invoking customary international law, similar to the *Paquete Habana* decision that used customary international law when the presidential proclamations called for its use.[20]

One important line of cases is found under the Alien Tort Statute (ATS), which provides in full in its present form: "The 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."[21] After lying dormant almost two centuries, this statute was resuscitated in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). Many other cases then arose and there were numerous court decisions that focused on "the law of nations" and generally equated that with customary international law. In *Filartiga* and several U.S. courts of appeals and district court cases since, the courts found that a norm of customary international law, such as against official torture or murder, had been violated and ruled for the alien plaintiff.

In Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), the U.S. Supreme Court analyzed the statute and ruled that it provided not only jurisdiction, but also the basis for a limited number of private causes of action in tort. The six-judge majority interestingly found that these causes of action came from customary international law, but they became part of federal common law after being evaluated for their content, acceptance among nations, and the practical consequences of making that cause of action available to litigants in federal courts.[22]

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[19] *Id*. at 699-700.

[20] For example, the plurality opinion of four Justices in Hamden v. Rumsfeld, (2006), 548 U.S. 557, 634 (2006), one of the terrorist detention cases, invoked to challenge a Military Commission Order an article in a Geneva Convention Protocol that the United States was not a party to, but was "indisputedly part of the customary international law." See also the ATS cases discussed next.

[21] 28 U.S.C. §1350 (2006).

[22] 542 U.S. at 724-25. See also footnote 21 of the opinion regarding considerations of exhaustion of remedies and possible deference to the Executive Branch's views.

The Court applied its criteria to Alvarez-Machain's claim in this case of "arbitrary detention"[23] and found essentially that his claim did not constitute any binding norm of customary international law and, further, that it did not meet the Court's other criteria. This decision narrowed the range of possible cases under the statute, but left the "door ajar" for some causes of action based on customary international law.

A very recent decision of the U.S. Supreme Court sharply narrowed the jurisdictional reach of the ATS, but did not significantly address the Court's substantive criteria in *Alvarez-Machain* for finding applicable norms of customary international law. Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013).

U.S. Executive Branch. In the U.S. Executive Branch, the President and officials in the Departments of State and Defense and other departments and agencies have often relied on, or been influenced by, customary international law in their actions. However, the exceptions in *Paquete Habana*, affirmed in later Supreme Court cases, have provided the bases for occasionally not applying customary international law.

Some of the most interesting examples of this selective invocation of customary international law come from President Ronald Reagan. He refused to sign the 1982 Law of the Sea Convention (Convention), which came into force in November 1994. (The United States has yet to ratify it.) Nevertheless, in March 1983, by a Presidential Proclamation and executive orders, Reagan announced that the United States would act in accord with the treaty's provisions on navigation and overflight. He also proclaimed an Exclusive Economic Zone (EEZ) in which the United States would exercise sovereign rights over the living and mineral sources within 200 nautical miles of its coast.

Reagan announced that his decisions were "consistent with . . . the convention and international law." Since the United States had not even signed the Convention and most of Reagan's decisions, including the 200-mile dimension and scope of the EEZ were new and changes from previous state practices. Reagan was essentially relying on his view of customary international law that arose from a Convention that was not yet in force. It was breath-taking. Reagan had moved quickly to capitalize on some of the Convention's provisions that were beneficial to the United States, knowing that other

[23] This was Alvarez-Machain's second appearance before the Supreme Court. He brought this ATS suit for damages after he had been released from prison because a U.S. district court had acquitted him of the criminal charges against him.

countries could hardly complain since they were likely to become parties to the Convention.

Five years later, Reagan acted in a similar manner by proclaiming in 1988 that the United States was extending its three-mile territorial sea to twelve nautical miles, saying that the 12 miles were "the limits permitted by international law." Again, the 12-mile limit was consistent with the still-not-in-force Convention, which the United States had still not signed, but this width of the territorial sea had not been clear in customary international law before the Convention.

3. International Institutions

Today a host of international institutions exist, ranging from the immediate post-World War II entities such as the UN, IMF, ICJ, and World Bank, to others that pre-dated World War II like the International Labor Organization, and to many more recent creations such as the WTO and the United Nations Environmental Programme (UNEP). In addition, there are a growing number of regional organizations, such as the European Union, the Organization of American States (OAS), and the organization for Asia-Pacific Cooperation (APEC).

These institutions vary greatly in their activities and effectiveness. However, many can create or play a key role in creating international law, such as the U.N.'s Security Council and ICAO. They and other international and regional entities, such as the WTO, have important roles in implementing and enforcing international law.

The United States, after hesitating to become entangled in Europe and the rest of the world until the 1900s, has generally supported the creation and operation of new international and regional institutions, being especially active in the aftermath of World War II through the 1990s. The record has been more mixed in recent years in some areas.

The United States was drawn into World War I, over some domestic opposition. It was poised to play a larger role on the world scene when the war ended in 1918, with the principal opportunity being the League of Nations, which President Wilson had helped create and support. However, a combination of isolationists and other opponents at home, political and personal rivalries among U.S. leaders, and the unwillingness of a tired and ailing President Wilson to compromise on some treaty

reservations led to the narrow defeat of the treaty. This defeat kept the United States out of the League and probably contributed to the League's lack of success over the next two decades.

In contrast to World War I, World War II was more personal to Americans after Pearl Harbor was attacked. Its scope across Europe, Asia, and Africa led to widespread and intense U.S. involvement in the conflict, and to many more American casualties than in World War I.

From early in the war, President Franklin D. Roosevelt and his advisers were heavily involved in creating a post-World War II architecture. After the war, the United States helped create and readily joined in the UN, ICJ, the International Military Tribunal at Nuremberg, the IMF, and the World Bank. On international trade, though, the Truman Administration was unable to get Congress to approve a new International Trade Organization (ITO). Congress has often been particularly sensitive to trade issues because trade can directly impact voters and jobs.

U.S. support for international institutions continued unabated through the 1980s, with the United States playing an active role in the UN, IMF, World Bank, and ICJ, and in the ad hoc replacement for the stillborn ITO, the General Agreement on Tariffs and Trade (GATT). The United States also supported the creation of new international and regional institutions, including the European Economic Community.

There were exceptions. For example, when the ICJ ruled against the United States in the preliminary stages of Nicaragua's suit in 1984, the United States withdrew from the litigation and gave notice that it was withdrawing from the ICJ's compulsory jurisdiction. This reflected President Reagan's deep dislike of the leftist Sandinista government as well as his general questioning of international law and institutions.

In the late 1980s and the 1990s, the United States supported the regional North American Trade Agreement (NAFTA), the WTO as a much stronger international institution than the GATT, the expansion of the then European Community and NATO, the Montreal Protocol on substances that deplete the ozone layer, and the creation of the special courts for the former Yugoslavia and Rwanda. Although the bombing campaign against Serbia in 1999 did not receive UN approval, the United States proceeded in conjunction with its NATO allies.

The longstanding tensions in the United States between internationalism and isolationism shifted toward the latter somewhat in the late 1990s because of U.S. concerns about the possible liability of its soldiers and officials in the International Criminal Court (ICC). The United States voted against the Rome Statute in 1996 and then did not join the ICC. And, the U.S. Senate's opposition to the 1997 Kyoto Protocol kept the United States out of that arrangement.

The Administration of George W. Bush in the first decade of the 21st century then brought a greater skepticism to international organizations, with this second Bush Administration strongly stating its opposition to the ICC and the Kyoto Protocol. And, unlike the George H.W. Bush Administration's cooperative approach in the U.N. and with many other states to the Iraqi invasion of Kuwait in 1990, the second Bush Administration decided to invade Iraq in 2003 without clear U.N. approval. Also, as discussed below, under the second Bush Administration, prisoners from the wars in Iraq and Afghanistan or suspected terrorists were treated in sometimes shocking ways, as exemplified by the activities at Abu Ghraib.

The Obama Administration, which took office in 2009, has had a different approach on many issues with international organizations. As its former State Department Legal Adviser, Harold Koh, stated essentially on several occasions that the Administration is "firmly committed to complying with all applicable law, including the laws of war. . . ."[24] The attitude toward the rule of law has been reflected not only in President Obama's and his Administration's pronouncements, but in the efforts to work more closely with the ICC and to gain U.N. Security Council support for the humanitarian intervention in Libya and for comprehensive, multilateral sanctions against Iran and North Korea.

4. Jurisdiction and Economic Sanctions

Disputes over jurisdiction often arise among states, in part because states very often have overlapping jurisdictional claims. However, a dispute does not necessarily mean there is a violation of international law.

[24] *E.g.*, Harold Hongju Koh, Legal Adviser, U.S. Department of State, "The Obama Administration and International Law," at Annual Meeting of Am. Soc. Int'l Law (March 25, 2010), http://www.state.gov/s/l/releases/remarks/139119.htm.

Since World War II, the United States has often been relatively more aggressive than many other countries in claiming jurisdiction to prescribe and enforce laws, particularly in the areas of antitrust and economic sanctions. The United States is hardly alone, though, in claiming jurisdiction over some activities beyond its borders. For example, France has made expansive claims in its civil and criminal laws in what some other countries have labeled "exorbitant jurisdiction."[25] And, some Arab countries, such as Syria, have imposed in the past their boycott against Israel to a foreign, non-Israeli company that deals with another foreign, non-Israeli company that does business with Israel (a so-called tertiary boycott).

The bases for finding jurisdiction under international law might be by treaty or customary international law. As for treaties, there are various provisions in a wide range of treaties that have jurisdictional implications. For example, in commercial treaties, there is sometimes a provision that a corporation that is incorporated in one of the treaty parties should be treated as a citizen of that state (and, implicitly, not the other state). Also, some of the treaties against aircraft hijacking and other terrorist activities prescribe that, if the state finds or catches an alleged offender, it should take steps to establish its criminal jurisdiction over the offender if it does not extradite that person to any of the treaty parties who do have jurisdiction.[26]

To the extent that treaties cover the matter, jurisdiction might well be a matter of treaty interpretation alone. Or, the treaty's provisions might be read in combination with customary international law, as illustrated by the *Sensor* case discussed below.

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[25] See, *e.g.*, Code Pénal art. 113-17 (Fr.); Code Civil art. 14-15 (Fr.). *See* Eric Cafritz, Omer Tene, Article 113-7 of the French Penal Code: The Passive Personality Principle, 41 Colum. J. Transnat'l L. 585 (2003). There are reports that the French legislature is seeking to amend some of these laws to reduce the extraterritorial impact. For an example of how someone might attempt to abuse the French laws' jurisdiction, see the unsuccessful suit by Dr. Calvo-Goller against Professor Joseph Weiler, the editor-in-chief of the *European Journal of International Law*. For an unofficial interpretation of the decision of the Tribunal de Grand Instance de Paris, see Dirk Voorhoof at http://strasburgobservers.com (March 8, 2011).

[26] This is the principle of "aut dedere aut judicare." For example, Article 9(4) of the 2005 UN Nuclear Terrorism Convention says: "4. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2 of the present article." See http://treaties.un.org/doc/Treaties/2005/04/20050413%2004-02%20PM/Ch_XVIII_15p.pdf.

As for customary international law, there is some ambiguity over how much jurisdictional principles are actually customary international law.

A starting point that is less and less accepted by most states and commentators is the 1927 *Lotus* case[27]. There the French steamer *Lotus* collided on the high seas with a Turkish ship, resulting in the death of eight people on the Turkish ship. When the *Lotus* arrived in Constantinople, Turkish authorities initiated criminal proceedings against Lieutenant Demons, the French watch officer on the *Lotus.* By agreement of the parties, the Permanent Court of International Justice was asked to decide whether Turkey had "acted in conflict with the principles of international law by asserting criminal jurisdiction over a foreign national for an offense occurring outside Turkish territory."

The PCIJ decided that there were no restrictions preventing the Turkish case against Demons. As the Court concluded:

> It does not . . . follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect to any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. . .
>
> In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction.[28]

Increasingly, though, states (including the United States and France) and other sources, such as the *Restatement (Third)*, take the position that customary international law requires a basis or positive principle for a state to claim jurisdiction to prescribe or enforce laws. The generally accepted bases or principles are:

- territory (including conduct having effects in the territory, sometimes called the objective territorial principle),
- nationality,
- the protective principle,
- passive personality, and

[27] The Case of the S.S. "Lotus" (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10.
[28] Note that the objective territorial principle, discussed below, could cover the *Lotus* case today. See generally, I.A. Shearer, STARKE'S INTERNATIONAL LAW 183-212 (11th ed. 1994).

- universality.

There is considerable ambiguity about the scope of some of these principles, especially the last three. The *Restatement (Third)* and other expert sources also indicate that the principle of reasonableness should be applied to all five of the bases above.

Of course, one state might have a claim under the territorial principle and another might have a claim under nationality, such as when a Nigerian citizen explodes a bomb in New York City. The *Restatement (Third)* provides a balancing test in Section 403, but not even U.S. courts have always accepted this balancing approach.[29] It is unclear what are the most common approaches used in other countries when states have overlapping jurisdictional claims.

Turning to U.S. jurisdictional claims in the last three decades, the United States has made some controversial claims to jurisdiction under, among other laws, its antitrust and sanctions law. Disputes over antitrust jurisdiction, however, have subsided recently because good working arrangements have been developed among U.S. and EU antitrust officials and because U.S. antitrust enforcement activities have been less aggressive.

Sanctions seem the most frequent source of serious friction. The two most controversial situations were, first, the 1982-83 U.S. sanctions against the Soviet Union's construction of a natural gas pipeline. The controls went beyond any previous assertion of extraterritorial jurisdiction under the U.S. export laws. One example was where controls prevented foreign subsidiaries of U.S. firms from exporting equipment or technology even though it was of wholly foreign origin.

This led to a specific case that arose in a Dutch court. Sensor Nederland B.V. (Sensor), a Dutch company wholly owned by another Dutch company which itself was a 100% subsidiary of a Texas corporation, had entered into a contract to sell geophones, which are used in oil exploration, to a French company, Compagnie Europeene des Petroles S.A. (CEP). The geophones were destined for the Soviet Union. After the

[29] In a 5-4 split decision, the U.S. Supreme Court in Hartford Fire Insurance Co. v. California, 509 U.S. 764 (1993), did not rely on *Restatement* Section 403. However, more recently in F. Hoffmann-La Roche Ltd. V. Empagran S.A., 542.U.S. 155 (2004), a nearly unanimous Court (8-0, with one abstention) declined to find jurisdiction in an international antitrust case with reasoning consistent with Section 403.

contract was made, the U.S. government extended its export controls against sales to the Soviet Union, even of goods of wholly foreign origin, to U.S. foreign subsidiaries. Sensor informed CEP that it would not be able to deliver the geophones as scheduled because of the new U.S. export controls.

In a careful decision, the Dutch lower court decided that Dutch private law, not French law, applied because Sensor was a Dutch corporation operating in the Netherlands and would perform the contract there. The court found that Sensor was in breach of the contract and would be liable for substantial liquidated damages. As for the U.S. export controls, the court considered their applicability under the nationality principle, objective territorial principle, and the protective principle. The court ruled that these principles were not applicable and that the U.S. laws were not compatible in this case with international law.[30]

The second controversial situation was created by the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, generally known as the Helms-Burton law. Title III creates a cause of action in U.S. courts on behalf of any U.S. national who has a claim for property confiscated by Cuba since January 1959, against any person who "traffics" in such property. "Trafficking" is defined broadly to include not only selling, buying, or leasing the property in question, but also engaging in "commercial activity" using the confiscated property. The remedy is not damages for the actual injury (which could be minor), but possible damages equal to the value of the property in question and even treble damages.

So, an Italian telephone company might decide to do business in Cuba—which is legal under Italian, EU, and Cuban law—and leases property to operate in Cuba. If this leased property falls into the Helms-Burton category of confiscated properties (and if

[30] "The Netherlands: District Court at the Hague Judgment in Compagnie Européenne des Petroles S.A. v. Sensor Nederland B.V.," 22 INT'L LEGAL MATERIALS 66 (1983). The court noted that the 1956 Treaty of Friendship, Commerce, and Navigation between the Netherlands and the United States of America provided that: "Companies constituted under the applicable laws and regulations within the territories of either Party shall be companies thereof. . . ." Yet, even though the court had found that Sensor was a Dutch company and that Dutch law applied, which was consistent with the treaty, the court asked whether the extraterritorial American export controls were compatible with international law. Regarding the objective territorial principle, or effects doctrine, the court concluded that it could not see "how the export to Russia of goods not originating in the United States by a non-American exporter could have any direct and illicit effects within the United States."

the law were in effect), the Italian company would be liable in U.S. courts for possible treble damages based on the full value of the property, not the lease.

Title III was vociferously opposed by European countries, Canada, and others. They and various scholars noted that the section did not meet any of the positive principles of jurisdiction noted above. Although Europeans and others still can become very upset when Helms Burton is mentioned, an important fact is that Title III has never gone into effect. In spite of their opposition to the Cuban government, the Clinton Administration, then the George W. Bush Administration, and now the Obama Administration have quietly waived the applicability of the statute every six months, as provided for under the statute.

Today's U.S. sanctions against Iran and North Korea are among the most comprehensive that the U.S. government has imposed. However, these sanctions create little or no friction with European countries and most other countries, except for Iran and North Korea, because of the Obama Administration's and the EU's success in having most of the sanctions incorporated into a series of UN Security Council resolutions that are binding on all member states under Article 25 of the UN Charter.

Some U.S. sanctions, however, contain provisions that are more restrictive than the UN sanctions and extend to third countries and independent foreign companies. In the Iranian sanctions, these include, for example, some restrictions on purchases of Iranian petroleum products, as well as against financial transactions with specified persons or entities that do business with Iran.

However, the Obama Administration has essentially relied on enforcement through sanctioning measures based on territorial or nationality principles. Enforcement can occur when the sanctioned government or foreign corporation seeks to undertake activities within the United States, or when the sanctioned entity or its assets are in the United States, or because U.S. persons are involved in the activities.[31]

As the United States continues to impose and enforce new sanctions, particularly against Iran, it remains to be seen whether the enforcement of these sanctions will continue to be consistent with the positive jurisdictional principles mentioned earlier.

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[31] See Barry E. Carter and Ryan M. Farha, "Overview and Operation of U.S. Financial Sanctions, Including the Example of Iran," 44 GEO. J. INT'L L. 903, 913 (2013).

5. Strikes by Armed Drones

Another recent activity where questions have been raised about U.S. adherence to international law is the use of armed drones to attack targets, including individuals, in foreign countries.

Drones have introduced a new technology to warfare and have generated a range of new strategic, tactical, policy, and legal questions into warfare. The technology has developed rapidly and armed drones are now capable of flying for hours, are hard to detect from the ground, and then can strike a target with a highly accurate missile with a powerful warhead.

The United States has pioneered in this technology and in their use, in part because of U.S. involvement in Afghanistan and the hunt for Al Qaeda and affiliated groups in Pakistan, the Arabian Peninsula, and North Africa.

The rapidly evolving capabilities of drones and the spread of Al Qaeda and affiliated groups means that the vast majority of strikes by armed drones have occurred since the Obama Administration took office in January 2009. The Administration appears to have continued to refine policies for their use.

Throughout this process, the Administration has repeatedly stressed that the goal is to act in accordance with all applicable law, domestic and international. In the first major public statement by a senior Obama official on the legality of the drone policy, the State Department Legal Adviser, Harold Koh, said on March 25, 2010:

> [I]n all our operations involving the *use of force*, including those in the armed conflict with al-Qaeda, the Taliban and associated forces, the Obama Administration is committed by word and deed to conducting ourselves in accordance with all applicable law. With respect to the subject of targeting . . . *it is the considered view of this Administration—and it has certainly been my experience during my time as Legal Adviser—that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.*
>
> The United States agrees that it must conform its actions to all applicable law. . . [A]s a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-

> defense under international law. [Italics part of official text provided by State Department.][32]

Later statements by Koh, Jeh Charles Johnson (the General Counsel of the Department of Defense), and other senior officials elaborated on the policies regarding drones and targeting.

In a major and thoughtful speech on May 23, 2013, on U.S. counterterror and drone policies, President Obama declared that "this war [on terror], like all wars, must end." He took the occasion to announce what appears to be a scaling back and more selective use of drones. He announced that he had signed off the day before on "clear guidelines, oversight and accountability that is now codified in Presidential Policy Guidance." He provided considerable detail about his policies, including:

> In the Afghan war theater, we must—and will—continue to support our troops until the transition is complete at the end of 2014.
>
> Beyond the Afghan theater, we only target al Qaeda and its associated forces. And even then, the use of drones is heavily constrained. American does not take strikes when we have the ability to capture individual terrorists; our preference is always to detain, interrogate, and prosecute.
>
> . . . [W]e act against terrorists who pose a continuing and imminent threat to the American people, and when there are no other governments capable of effectively addressing the threat. And before any strike is taken, there must be near-certainty that no civilians will be killed or injured—the highest standard we can set.[33]

President Obama also made clear that his Administration continues to review drone policies and will engage Congress in these reviews.

There has been considerable debate about and criticisms of the Administration's drone policies, including the lack of transparency and the procedures involved when a U.S. citizen is targeted. However, on the question of whether the policies for use of

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[32] Koh, *supra* note 25.

[33] President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013), found at http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university.

drones violate international law,[34] I do not find the criticisms convincing, especially in light of the May 2013 policies announced by President Obama and in part because of the somewhat amorphous nature of much of the international law regarding use of force.[35]

6. The Treatment of Suspected Terrorists

The past U.S. policies on torture and other treatment of suspected terrorists are much more problematic than the drone policies, notably in the period after September 11, 2001, and until January 2009. In his recent May speech, it is highly significant for a sitting President of the United States to say, as President Obama did, that:

> And in some cases, I believe we compromised our basic values—by using torture to interrogate our enemies, and detaining individuals in a way that ran counter to the rule of law.[36]

To be sure, Obama was talking of the previous Bush Administration, but it is still an acknowledgment of errors by the United States. It is notable that there was no discernible outcry by the American public or even former officials to this particular statement about past practices.

To his credit, on his second full day in office in 2009, President Obama signed two Executive Orders. One banned the use of torture. Recognizing that the problem was not just caused by contractors or lower-level government employees, the President effectively revoked, among many other past government documents, the earlier influential opinions of the Department of Justice's Office of Legal Counsel. Harold Koh has stated that those opinions permitted practices "that I consider to be torture and cruel treatment." The Executive Order also directed that all interrogations of detainees be conducted in accordance with the Geneva Conventions' Common Article 3 and in accordance with the revised Army Field Manual.

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[34] *E.g.*, Mary Ellen O'Connell, "Dangerous Departures," 107 AM. J. INT'L L. 380, 385 (2013).
[35] *See generally* Thomas M. Franck, RECOURSE TO FORCE 24-40 (2002) (excellent analysis of the post-World War II examples of the use of force and the U.N. Charter); Barry E. Carter & Allen S. Weiner, INTERNATIONAL LAW 931-997 (6th ed. 2011).
[36] Obama, *supra* note 34.

The President also ordered that Guantanamo be closed.[37] However, that has not happened. About 70 detainees have been transferred to other countries, but Congress has since imposed funding and other restrictions that hindered the relocation of detainees to other countries or to the United States. As of August 2013, about 164 detainees remain with many on hunger strike and many of those being force-fed, a situation that President Obama has deplored. In his May 2013 speech, Obama announced a new push to get Congress to lift its restrictions on his efforts by the Administration to relocate the detainees.

Hopefully, Congress will provide the President with the flexibility to relocate detainees and bring to justice those who can be tried. As President Obama recognized in his May speech, "history will cast a harsh judgment on this aspect of our fight against terrorism and those of us who fail to end it."

Conclusion

In the period since World War II, the United States has, with a few recent exceptions, supported the creation and operation of international and regional institutions that sometimes make law and often help implement and enforce it.

As for international law, the United States has usually complied with treaties on the international level, though some might not be enforceable domestically. Customary international law is "part of [U.S.] law," but the courts have provided wide exceptions to its use and the Executive Branch has selectively invoked it.

On questions of jurisdiction, the United States has been relatively aggressive in asserting jurisdiction compared to many countries, but there are not many situations when foreign courts or experts have concluded that the United States acted beyond the positive principles of jurisdiction.

U.S. policies on attacks by armed drones might be controversial, but there are strong arguments that these policies are consistent with the somewhat amorphous international law on the use of force. On the other hand, past U.S. policies on torture and the treatment of terrorists were arguably not consistent with international law for a

[37] The President's two Executive Orders were Exec. Order No. 13,491 (Jan. 22, 2009), 74 Fed. Reg. 4893, and Exec. Order No. 13,492 (Jan. 22, 2009), 74 Fed. Reg. 4897. The second Executive Order was later modified by Exec. Order No. 13,567 (March 7, 2011), 76 Fed. Reg. 13,277. Koh's statement is found *supra* note 25.

period between September 2001 and January 2009. Since then, the torture policies have been brought into line with applicable international law and hopefully Congress will allow the Administration to proceed with its plans to close Guantanamo.