

THE INTERNATIONALIZATION OF U.S. LAW

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Speech

The Internationalization of U.S. Law

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The following luncheon address was given during International Law Weekend in New York on October 28, 2006. The speech addresses the growth of international legal jurisprudence and refutes claims that U.S. law remains unaffected by it.

Some of you may draw one of three conclusions from the title of my remarks: (1) he will be talking about the good old days when both Democrats and Republicans agreed on the need for international law and multilateral institutions—maybe the end of WWII or the end of the Cold War; or (2) he will be taking the long-term view, about when Washington changes hands and the U.S. will re-emerge as a good international citizen; or (3) if he is talking about today, the President of the American Society of International Law (ASIL) is on drugs. It would take mind-altering substances to consider the present day anything like the golden age when members of the International Law Association and the American Society of International Law were present at the creation of the United Nations (UN), the World Bank and the International Monetary Fund (IMF). Hasn't he heard that the U.S. Congress just passed legislation that appears to thumb its nose at the Geneva conventions?¹ That the United States persists

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1. *See generally* Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(a), 120 Stat. 2600 [hereinafter MCA] (averring that the U.S. statutory provisions punishing war crimes, as amended, “fully satisfy the obligation under . . . the Third Geneva Convention for the United States to provide effective penal sanctions for grave breaches [of] . . . common Article 3.”). Notwithstanding this reassurance and section 6(a)’s less-than-subtle title, “Implementation of Treaty Obligation,” one is left with little comfort by other provisions that

in staying away from some of the most far-reaching international regimes of our era, from landmines² to climate change³, and threatens, by statute, to wage war on the International Criminal Court (ICC)?⁴ That it has withdrawn from the optional protocol of the Vienna Convention on Consular Affairs lest more Mexicans on death row successfully sue the United States in the ICJ?⁵ That UN delegates are apparently so disgusted with U.S. actions that they stand on their chairs and cheer in the General Assembly when Hugo Chavez likens President Bush to Lucifer?⁶

At the risk of sounding like Bill Clinton, let me assure you

define "grave breaches" with reference solely to domestic law that allow the President to authoritatively interpret the Geneva Conventions and that generally bar detainees from invoking the Geneva Conventions in court against U.S. military officers. MCA, 120 Stat. at 2631–2633; *see also* John Duberstein, *Excluding Torture: A Comparison of the British and American Approaches to Evidence Obtained by Third Party Torture*, 32 N.C. J. INT'L L. & COM. REG. 159, 177–79 (2006) (outlining concerns raised by MCA's implementation of Geneva Conventions). For more on MCA provisions shielding U.S. officers from liability under customary international law, *see infra* note 127 and accompanying text.

2. *See* Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 [hereinafter Ottawa Convention]; *see also* Christine Capuche, *The Ottawa Treaty and its Impact on U.S. Military Policy & Planning*, 25 BROOK J. INT'L L. 183, 183–84 (1999) (noting that President Clinton refused to sign Ottawa Convention because (1) it would require removal of anti-personnel landmines along demilitarized zone between North and South Korea, and (2) its language banned anti-tank mines).

3. *See* Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22; United Nations Framework Convention on Climate Change, *opened for signature* June 4, 1992, 31 I.L.M. 849 [hereinafter FCCC]; Christopher D. Stone, *Common but Differentiated Responsibilities in International Law*, 98 AM. J. INT'L L. 276, 279–80 (2004) (explaining that differing treatment of countries based on responsibility for climate change, "in particular the failure to extract reduction commitments from China and India, became a basis for the United States to sideline itself from Kyoto and therefore from much of the FCCC regime's progress").

4. *See* American Servicemembers' Protection Act, 22 U.S.C. § 7427 (2006) (authorizing the President to use "all means necessary" to bring about the release of any person "detained or imprisoned by or on behalf of or at the request of the International Criminal Court"); *see generally* JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 665–66 (2d ed. 2006) (highlighting the U.S. policy of active opposition to the International Criminal Court).

5. *See* Letter from Condoleezza Rice, U.S. Sec'y of State, to Kofi Annan, U.N. Sec'y-Gen. (Mar. 7, 2005), *available at* http://untreaty.un.org/English/CNs/2005/101_200/186E.doc (declaring United States' withdrawal from Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *done* Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487).

6. *See Chavez: Bush 'Devil'; U.S. 'on the Way Down'*, CNN.COM, Sept. 21, 2006, <http://www.cnn.com/2006/WORLD/americas/09/20/chavez.un/index.html> (quoting Chavez as saying, "[t]he devil came here yesterday," in reference to Bush's speech before the U.N. the previous day, and adding that "it smells of sulfur still today.").

that I have not inhaled, but that, yes, I am talking about the present day. I want to suggest how the “evolving world of international law” is turning U.S. law inside-out. I will suggest that as never before in U.S. history, all three branches of the federal government, as well as the citizenry, media, and representatives of civil society—from the world of NGOs and from the private sector—are now perennially engaged with international and foreign law, despite bills in Congress that seek to halt this phenomenon, at least with respect to federal judges.⁷ I will address only a few current realities to make my point and to suggest that legal internationalization is likely to accelerate, not decline. All of you here, inspired by this very conference, will be able to suggest others.

I.

The internationalization of U.S. law is occurring because of the mission creep⁸ of those international regimes that we are very much a part of and from which we are unlikely to detach because they support the United States’ national interest: namely, the UN system, the international financial institutions and the World Trade Organization (WTO). All of these institutions are, to greater and lesser extents, expanding their domain beyond what was originally intended by those who entered into the original treaties establishing them.

Today’s UN General Assembly and Security Council have eroded the core non-interference norm of Art. 2(7) of the Charter.⁹

7. See, e.g., S. 520, 109th Cong. § 201 (2005) (barring U.S. courts from relying upon any constitution, law, administrative rule, executive order, directive, policy, judicial decision or any other action of any foreign state or international organization or agency (other than English constitutional and common law up to the time of the adoption of the Constitution) in interpreting and applying the Constitution of the United States); H.R. 1070, 109th Cong. (2005); see also H.R. Res. 97, 109th Cong. (2005) (expressing sense of House of Representatives to same effect).

8. See generally Jessica Einhorn, *The World Bank’s Mission Creep*, FOREIGN AFF., Sept.–Oct. 2001, at 22; see also José E. Alvarez, *International Organizations: Then and Now*, 100 AM. J. INT’L L. 324, 328 n.22 (2006).

9. This has been true for decades. Compare ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 58–130 (1963) (setting forth broad view of power of UN organizations and comparatively narrow view of prohibited “interventions” into domestic jurisdiction under Article 2(7)), with JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 156–83 (2005) [hereinafter ALVAREZ, LAW-MAKERS] (referencing Higgins’ view of Article 2(7)’s scope and describing

Nothing today is considered immune, on the basis of sacred "domestic jurisdiction," from consideration by either body and in the case of the Security Council, even legally binding Chapter VII enforcement action.¹⁰ Thanks in substantial part to the United States' very own revolution on behalf of human rights, it is impossible to suggest (as some still try) that the U.S. treaty power is confined by subject matter to foreign affairs.¹¹ At a time when the U.S. government itself sometimes insists that international norms supplement the Constitution's dormant Commerce and Takings Clauses,¹² that we have the right to examine how other nations treat their own nationals,¹³ and that there may even be international limits on how others choose to rule themselves,¹⁴ it is impossible to contain the sphere of international law.

the subsequent expansion of U.N. organization activity into "even those matters that Higgins implied were sacrosanct, such as a state's right to determine for itself its form of government or its economic system").

10. See, e.g., S.C. Res. 1540, ¶ 3, U.N. Doc. S/RES/1540 (Apr. 28, 2004) (regulating to prevent proliferation of weapons of mass destruction and delivery systems); S.C. Res. 1373, ¶ 1, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (imposing Member State duties to prevent financing and other support for terrorists and to increase cooperation in information sharing to undermine terrorism); S.C. Res. 940, ¶ 4, U.N. Doc. S/RES/940 (July 31, 1994) (authorizing, under Chapter VII, "a multinational force [of Member States] . . . to use all necessary means to facilitate the departure from Haiti of the military leadership . . . , the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti"); see generally ALVAREZ, LAW-MAKERS, *supra* note 9, at 169-83 (discussing Chapter VII actions that push the boundaries of Article 2(7)).

11. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 302 cmt. c (1987) ("Contrary to what was once suggested, the Constitution does not require that an international agreement deal only with 'matters of international concern.'").

12. There is no guarantee that dispute settlers in the WTO or arbitrators under U.S. investment agreements will invariably interpret U.S. obligations to accord foreign traders or investors non-discriminatory treatment in a way that is fully in accord with U.S. courts' interpretations of the U.S. commerce clause. See generally, Robert Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test*, 32 INT'L L. 619 (1998). Nor is there any guarantee, despite U.S. attempts in some but not all of its bilateral investment treaties to have investor-state arbitrators under such agreements render decisions consistent with U.S. takings jurisprudence, that such arbitrators will follow that guidance when they interpret U.S. obligations to pay compensation to foreign investors when these are subjected to direct or indirect takings. See also The Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., Oct. 25, 2004, Annex B, available at http://www.ustr.gov/Trade_Agreements/BIT/Uruguay/Section_Index.html (identifying factors relevant to determining whether government action is an "indirect taking").

13. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (interpreting UN Charter to support proposition that "in this modern age a state's treatment of its own citizens is a matter of international concern.").

14. The situation in Iraq provides an apt example. See, e.g., George W. Bush, President of the U.S., Speech on Iraqi Elections, Victory in the War on Terror, at the Woodrow Wilson Center (Dec. 14, 2005), available at <http://www.globalsecurity.org/wmd/library/news/iraq/2005/12/iraq-051214-whitehouse01.htm> ("We are in Iraq today be-

Try as we might, the General Assembly is no longer constrained (if it ever was) from making recommendations even with respect to matters being examined by the Council—from the legality of the Israeli security wall¹⁵ to the due process rights of alleged terrorists.¹⁶ The human rights genie that we helped to breed is out of its bottle. It is being used by all, including by domestic NGOs and the government—for instance, in criticizing the selectivity of the UN's own human rights actions.¹⁷ Human rights now make a prominent appearance in the ICJ,¹⁸ at the World Bank¹⁹ and even indirectly at the

cause our goal has always been more than the removal of a brutal dictator; it is to leave a free and democratic Iraq in its place.”); Wayne G. Reilly, Editorial, *Let Pragmatism Guide Our Foreign Policy*, ROANOKE TIMES, Jan. 18, 2004, at 3 (describing U.S. efforts to foster democracy in Iraq and decrying them “not because they are intrinsically wrong . . . but because the effort is impractical and distracts [the United States] from the far more important . . . Palestinian/Israel [sic] dispute”). In fact, recent U.S. support for democracy in Iraq has been echoed by Security Council resolutions on the subject. See *infra* note 47.

Of course, the U.S. Executive's devotion to spreading democracy across the globe has been around at least since the eve of WWI, when President Wilson declared, “The world must be made safe for democracy.” Woodrow Wilson, Address to a Joint Session of Congress (Apr. 2, 1917), in 41 PAPERS OF WOODROW WILSON 525 (Arthur S. Link ed., 1983); see also Pierre M. Atlas, Editorial, *Evangelist Bush Preaches Democracy to World*, INDIANAPOLIS STAR, Mar. 3, 2005, at A12 (noting this and other historical examples of presidents promoting spread of U.S. values, including democracy). Moreover, the methods that U.S. presidents use to promote democracy need not be so dramatic as the toppling of Saddam. See *id.* (“At a press conference last week with a visibly unhappy Vladimir Putin at his side, President Bush chided the Russian president for his government's democratic backsliding. This was but the latest statement by Bush stressing the absolute necessity for democratization worldwide.”).

15. See G.A. Res. ES-10/13, U.N. Doc. A/RES/ES-10/13 (Oct. 27, 2003) (declaring Palestinian wall a violation of international law and ordering Israel to deconstruct it). The ICJ has since declared that Israel's construction of the wall violates international law. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 184, 201 (July 9). For a description of actions that the General Assembly and others took prior to the ICJ taking up the case to address Israel's occupation of Palestine, see *id.* at 145–48.

16. See G.A. Res. 60/158, ¶ 7, U.N. Doc. A/RES/60/158 (Feb. 28, 2006) (addressing “Protection of human rights and fundamental freedoms while countering terrorism”).

17. See, e.g., Michael H. Posner, *ASIL Report: Reflections on the Vienna Conference*, AM. SOC'Y OF INT'L L. NEWSL., Sept. 1993 (noting that complaints of UN selectivity in addressing human rights abuses are “usually made by rights-abusing governments” but acknowledging that the charge “has some justification”); but cf. *ASIL Meetings & Regional Activities: ILA International Law Weekend Program Announced*, AM. SOC'Y OF INT'L L. NEWSL., June 1994 (announcing panel discussion entitled “Selective Enforcement: Is the United Nations Biased?”).

18. See, e.g., *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J., ¶¶ 205–21, 258–65, 345(2)–(3) (Dec. 19), available at <http://www.icj-cij.org/docket/files/116/10455.pdf> (last visited June 17, 2008) (finding Uganda forces in DRC territory violated wide range of human rights obligations under customary and conventional law, as well as ICJ's previous order for provisional measures, and holding Uganda

WTO²⁰—and in street demonstrations protesting against some of these institutions themselves.²¹

A panoply of UN experts and assorted others—from human rights treaty bodies to the special rapporteur on torture—now routinely make ever more specific legal pronouncements about such things as the propriety or consequences of “invalid” treaty reservations,²² specific interrogation techniques²³ or states’ reliance on dip-

liable for reparations); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, at 171–72, 177–81, 189–95, 197–202 (discussing human rights violations posed by Palestinian wall and actions required of Israel and other nations to correct situation).

19. *Compare, e.g.,* Gunther Handl, *The Legal Mandate of Multilateral Development Banks as Agents for Change Toward Sustainable Development*, 92 AM. J. INT’L L. 642, 649–50 (1998) (recognizing that multilateral development banks (MDBs), like the World Bank, “routinely make investment decisions based, inter alia, on sensitive ‘noneconomic’ considerations, . . . [m]any of [which] reflect basic human rights concerns; and there is no denying that certain human-rights-related conditionalities have become part and parcel of MDBs’ routine loan requirements”), *with, e.g.,* Horacio Javier Etchichury, *Argentina: Social Rights, Thorny Country: Judicial Review of Economic Policies Sponsored by the IFIs*, 22 AM. U. INT’L L. REV. 101, 116–19 (2006) (arguing that policies of World Bank and other international financial institutions in Argentina have had adverse impact on human rights and that the reason for this result is that they “do not consider human rights as binding limits in their policy-design process.”).

20. In the words of Kofi Annan:

The goals and principles of the WTO agreements and those of human rights law do, therefore, share much in common. Goals of economic growth, increasing living standards, full employment and the optimal use of the world’s resources are conducive to the promotion of human rights, in particular the right to development. Parallels can also be drawn between the principles of fair competition and non-discrimination under trade law and equality and non-discrimination under human rights law. Furthermore, the special and differential treatment offered to developing countries under the WTO rules reflects notions of affirmative action under human rights law.

The Secretary General, *Globalization and its Impact on the Full Enjoyment of all Human Rights: Preliminary Report of the Secretary-General*, ¶ 16, UN Doc. A/55/342 (Aug. 31, 2000). *But see* Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT’L L. 489, 506 (2001) (“[I]n view of the broad goals articulated in the preamble to the WTO Agreement (e.g., sustainable development, full employment, and reiterated concern for less developed states) and other comparable provisions, WTO bodies should include the core of fundamental human rights in their canon.”).

21. *See, e.g.,* Don Lee, *WTO Protests in Hong Kong Turn Violent*, L.A. TIMES, Dec. 18, 2005, at A3 (reporting on particularly violent anti-globalization protests outside six-day WTO meeting in Hong Kong); Austin Bunn, *Them Against the World, Part 2*, N.Y. TIMES, Nov. 16, 2003, (Magazine), at 58 (providing in-depth account from activists’ perspective of the broad protest movement against entities such as the WTO, G-8, World Bank, and IMF).

22. *See, e.g.,* Human Rights Comm., General Comment 24, ¶¶ 8–18, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994) (discussing potentially impermissible ICCPR reservations and unilaterally rejecting the traditional VCLT principle of inter-State reciprocity for evaluating a reservation’s validity, declaring instead that the Human Rights Committee

lomatic assurances when engaging in the foreign rendition of suspects.²⁴ While the U.S. executive branch has contested many of these pronouncements,²⁵ even the one hundred plus lawyers of the U.S. State Department are no match for the sheer quantity and variety of this institutionalized output, which—as amplified by the voice of organizations like Human Rights Watch—may achieve a legitimacy greater than the views of any single nation, including the United States.

itself will be in charge of deciding whether a reservation is compatible with the ICCPR); *id.* ¶ 18 (using its self-claimed power of evaluating ICCPR reservations to declare that “[t]he normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party,” but that, “[r]ather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.”).

23. See, e.g., U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 17, U.N. Doc. A/59/324 (Sept. 1, 2004) (prepared by Theo van Boven) (condemning certain interrogation methods as “violat[ions of] the prohibition of torture and ill-treatment,” and specifically mentioning, among other techniques, “holding detainees in painful and/or stressful positions, depriving them of sleep and light for prolonged periods, exposing them to extremes of heat, cold, noise and light, hooding, depriving them of clothing, stripping detainees naked and threatening them with dogs”); cf. José E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT’L L. 175, 185–86 & n.40 (2006) [hereinafter Alvarez, *Torture*] (citing the Special Rapporteur’s report and other sources for impermissibility of these techniques under international law and, by comparison, demonstrating the U.S. torture memos’ deeply flawed understanding of international law’s definition of torture).

24. See Press Release, United Nations, ‘Diplomatic Assurances’ Not an Adequate Safeguard for Deportees, UN Special Rapporteur Against Torture Warns (Aug. 23, 2005), available at <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/9A54333D23E8CB81C1257065007323C7?opendocument> (reporting Special Rapporteur on Torture’s belief that “[d]iplomatic assurances are not an appropriate tool to eradicate th[e] risk [of torture abroad]” because “[s]uch memoranda of understanding . . . do not provide any additional protection to the deportees,” but are used rather to circumvent the obligation to refuse to deport when a risk of torture exists).

25. See, e.g., Observations on General Comment No. 24 (52), United States of America, in Report of the Human Rights Committee, U.N. GAOR, 50th Sess., Supp. No. 40, Vol. I, Annex VI at 126–27, U.N. Doc. A/50/40 (1996) [hereinafter U.S. Observations on General Comment No. 24] (criticizing Human Rights Committee’s assertion of authority to independently determine permissibility and consequences of ICCPR reservations, pointing out that the Committee’s position, among other things, “appears . . . to divest States Parties of any role in determining the meaning of the Covenant”); Alvarez, *Torture*, *supra* note 23, at 179 (analyzing how the “Bush Administration’s infamous torture memoranda . . . twisted, in small and large ways, international law,” including international law as reflected in the Special Rapporteur on Torture’s globally-supported position in specific interrogation techniques); President George W. Bush, Press Conference (Mar. 16, 2005), available at <http://www.nytimes.com/2005/03/16/politics/16text-bush.html?pagewanted=4> (“[O]ne way to [protect our people and our friends from attack] is to arrest people and send them back to their country of origin with the promise that they won’t be tortured. . . . This country does not believe in torture. We do believe in protecting ourselves.”).

It is impossible for even the United States to register its persistent objection—if that is what it is—to the sheer multitude of today’s international law-makers. And the United States’ “soft power” now has to contend with those of activist NGOs around the world who often serve as the “bad cop” to those international organizations too meek to serve as anything other than “good cop.” Inevitably, some of this legal output—whose content not even the United States can control—whether incorporated in Alien Tort Claims Act-based plaintiffs’ briefs or in *amici* before appellate courts, has begun to influence even relatively nativist judges.²⁶ Such judges sometimes find themselves citing, as never before, “soft” law such as General Assembly resolutions, reports of human rights rapporteurs, judgments issued by international criminal courts or guidelines for multinational corporations, at least by way of interpreting U.S. law and even in some rare cases, the U.S. Constitution.²⁷

As the UN High Commissioner on Human Rights Louise Arbour has suggested, the global war on terror has also played a part in

26. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005) (holding that execution of juveniles violates the Eighth and Fourteenth Amendments of U.S. Constitution and basing its conclusion on, among other things, amici briefs submitted by both human rights NGOs and foreign governmental organizations); *Jean v. Dorelien*, 431 F.3d 776, 781–83 (11th Cir. 2005) (noting that, in erroneously dismissing Haitian plaintiff’s ATCA and TVPA claims on exhaustion grounds, lower court had relied exclusively on fact that plaintiff had “legally binding judgement [sic] in Haiti against [defendant,]” ignoring both plaintiff’s claim that the judgment was “ineffective and currently unenforceable in Haiti,” and evidence she presented supporting that claim—citing, in particular, an Amnesty International report plaintiff had raised indicating that “former members of [Haiti’s] military regime, including [defendant], threaten the current rule of law in Haiti”); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1074–78 (9th Cir. 2004) (relying repeatedly on congressional testimony by Human Rights Watch in holding that Guatemalan asylum seeker’s application was erroneously denied, concluding that her rape was not a “random criminal act,” but rather part of a campaign of systematic rape by the Guatemalan military meant as retaliation against guerilla rebels); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (relying on *amici* for proposition that even non-state actors can be charged with some human rights violations).

27. See, e.g., *Simmons*, 543 U.S. at 575–78 (basing interpretation of U.S. Constitution on domestic law of foreign nations, on amici from IOs, NGOs and governmental groups, and on human rights treaties to which U.S. is not a party); *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003) (citing decisions of European Court of Human Rights and human rights interpretations of foreign nations in holding that right to liberty under Due Process Clause bars criminalizing sexual activity between members of same sex); *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (concluding that “official torture is now prohibited by the law of nations”—and thus is actionable under ATCA—after citing panoply of soft law, including affidavits and publications from international legal scholars, General Assembly resolutions such as the Universal Declaration of Human Rights, a decision from the European Court of Human Rights and “the constitutions of over fifty-five nations”).

the internationalization of U.S. law.²⁸ As American judges and law enforcers increasingly deal with legal issues involving others' citizens and others' territory, they find an increasing need to work with those others and to examine both international rules and foreign law. Global and common justice concerns—and not merely those under U.S. law—are implicated by the detention and treatment pending trial of detainees in a war subject to no evident temporal or geographical boundaries or by, for example, the transnational privacy implications posed by internet and satellite communications and governments' efforts to regulate them.

Of course, the same war on terror has facilitated the legislative turn of the UN's Security Council, which has now adopted legally binding action directed at the world as a whole and not merely a single target rogue nation.²⁹ Largely at the United States' behest, the Security Council has become a global law-maker and not just a sporadic collective enforcer of the peace. Apart from repeated, and now increasingly routine, collective sanctions efforts and the occasional authorization to use force, that body has settled a boundary dispute,³⁰ created a standing dispute settlement mechanism to settle post-war interstate disputes,³¹ established two ad hoc war crimes tribunals³²

28. See Louise Arbour, U.N. High Comm'r for Human Rights, In Our Name and on Our Behalf, Speech at Chatham House (Feb. 15, 2006), available at http://www.chathamhouse.org.uk/files/3375_ilparbour.pdf (criticizing U.S. Executive's practices concerning extraordinary rendition and interrogation of terrorism suspects, arguing that these practices are "tainted by secrecy and a tendency to avoid judicial scrutiny," thus circumventing strictures of international law that might otherwise limit such practices); Louise Arbour, U.N. High Comm'r for Human Rights, On Terrorists and Torturers, Statement for Human Rights Day (Dec. 7, 2005), available at http://www.unama-afg.org/news/_statement/Others/2005/_others/05dec07-Louise%20Arbour%20Statement.doc (noting "the absolute ban on torture, a cornerstone of the international human rights edifice, is under attack. The principle once believed to be unassailable—the inherent right to physical integrity and dignity of the person—is becoming a casualty of the so-called 'war on terror'").

29. See generally ALVAREZ, LAW-MAKERS, *supra* note 9, at 184–98; Emilio J. Cárdenas, *The United Nations Security Council's Quest for Effectiveness*, 25 MICH. J. INT'L L. 1341 (2004); Eric Rosand, *The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?*, 28 FORDHAM INT'L L.J. 542 (2005); Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901 (2002); Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT'L L. 175 (2005).

30. See S.C. Res. 687, ¶¶ 2–6, U.N. Doc. S/RES/687 (Apr. 8, 1991) (laying groundwork to secure the border between Iraq and Kuwait).

31. See *id.* ¶ 19 (directing the Secretary-General to recommend "appropriate procedures for evaluating losses, listing claims and verifying their validity and resolving disputed claims in respect of Iraq's liability" for damage it caused as a result of invading Kuwait).

32. See S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993) (establishing the In-

and influenced prosecutions in a third,³³ is embarking on the creation of another (hybrid) tribunal to deal with a terrorist act,³⁴ enhanced its own authority as well as powers of the International Atomic Energy Agency (“IAEA”) over weapons inspections,³⁵ expanded the range of peacekeepers’ authority—including as de facto administrators of territory,³⁶ repeatedly authorized election assistance and supervision,³⁷ criminalized for the world a range of terrorist activity (including financial transactions that facilitate terrorism),³⁸ imposed smart sanctions on designated individuals and groups allegedly connected to the

ternational Criminal Tribunal for Yugoslavia); S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994) (establishing the International Criminal Tribunal for Rwanda).

33. See S.C. Res. 1593, ¶ 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005) (announcing that the Security Council “[d]ecides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court”).

34. See, e.g., S.C. Res. 1664, ¶ 1, U.N. Doc. S/RES/1664 (Mar. 29, 2006) (requesting that the UN Secretary General begin negotiations with the government of Lebanon to establish a tribunal of “an international character” to try those responsible for the terrorist bombing that killed Lebanese Prime Minister Rafiq Hariri).

35. See S.C. Res. 699, ¶ 2, U.N. Doc. S/RES/699 (June 17, 1991) (confirming power of Special Commission and IAEA to conduct inspections “for the purpose of the destruction, removal or rendering harmless of” chemical, biological and nuclear weapons as specified in Resolution 687); S.C. Res. 687, *supra* note 30, sec. C (laying groundwork for Iraq inspections regime to neutralize militaristic threats, including by dispossessing Iraq of biological, chemical and nuclear weapons).

36. See S.C. Res. 1483, pmbl., U.N. Doc. S/RES/1483 (May 22, 2003) (acknowledging that, “as occupying powers under unified command” within Iraq, United States and United Kingdom were endowed with “specific authorities, responsibilities, and obligations under applicable international law”); S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999) (creating the United Nations Transitional Administration in East Timor, which was “empowered to exercise all legislative and executive authority, including the administration of justice”); S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999) (directing the Secretary-General to establish an “interim administration for Kosovo”).

37. See, e.g., Douglas Lee Donoho, *Evolution or Expediency: The United Nations Response to the Disruption of Democracy*, 29 CORNELL INT’L L.J. 329, 335–37 & nn.31–38 (1996) (discussing examples of nations for which the Security Council has provided election assistance and monitoring, including Angola, Cambodia, El Salvador, Liberia, Mozambique, Namibia, South Africa and the Western Sahara).

38. See S.C. Res. 1373, *supra* note 10, ¶¶ 1(b), 2(e) (obligating nations to take various steps to combat terrorism, including “[c]riminaliz[ing] the wilful provision or collection . . . of funds . . . to carry out terrorist acts” and that “participat[ion] in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts . . . are established as serious criminal offences in domestic laws and regulations. . .”). Resolution 1373 also called upon states to ratify the International Convention for the Suppression of the Financing of Terrorism, which provides for the criminalization of financing terrorist activity. *Id.* ¶ 3(d); see also International Convention for the Suppression of the Financing of Terrorism, arts. 2, 4–6, *opened for signature* Jan. 10, 2000, 39 I.L.M. 270 [hereinafter Terrorist Financing Convention].

Taliban and Al Qaeda,³⁹ developed “best practices” for the world’s law enforcement agencies with respect to counter-terrorism and the non-proliferation of weapons of mass destruction,⁴⁰ and supervised the military occupation of a state.⁴¹

The Security Council’s mission creep is having dramatic effects on the law—on the interpretation of UN Charter article 39,⁴² on

39. See S.C. Res. 1455, U.N. Doc. S/RES/1455 (Jan. 13, 2003) (increasing the power of the Committee and Monitoring Group to oversee state compliance with previous antiterrorism resolutions); S.C. Res. 1390, ¶ 2, U.N. Doc. S/RES/1390 (Jan. 16, 2002) (requiring states to impose travel, funds, and arms sanctions on Osama bin Laden, al Qaeda, the Taliban and “other individuals, groups, undertakings and entities associated with them, as referred to in the list” maintained by the Committee); S.C. Res. 1363, U.N. Doc. S/RES/1363 (July 30, 2001) (establishing Monitoring Group to evaluate states’ implementation of Resolutions 1333 and 1267, “including in the fields of arms embargoes, counterterrorism and related legislation . . . , money laundering, financial transactions and drug trafficking”); S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000) (imposing financial sanctions on “Usama bin Laden and individuals and entities associated with him” and expanding sanctions against Taliban and its affiliates); S.C. Res. 1267, ¶¶ 4, 6, U.N. Doc. S/RES/1267 (Oct. 15, 1999) (commanding that nations prohibit air travel with, freeze assets of, and deny financial support to Taliban and its affiliates, and establishing Committee to oversee compliance with requirements of Resolution).

40. See S.C. Res. 1566, ¶ 7, U.N. Doc. S/RES/1566 (Oct. 8, 2004) (asking Counter-Terrorism Committee (CTC) of Security Council “to develop a set of best practices to assist States in implementing the provisions of resolution 1373 (2001) related to the financing of terrorism”); see also Rosand, *supra* note 29, at 584 & n.187 (noting CTC’s provision of best practices for combating terrorism as example of flexible approach that Security Council should take to such antiterrorism mandates).

41. Prior to the 2003 invasion of Iraq, military occupations authorized (or later ratified) by the Security Council have generally “been accorded a degree of formal consent by the government of the country concerned.” Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT’L L. 580, 604 (2006) (listing, as examples of such occupations, “(1) Haiti (1994–2000 and from 2004 onward); (2) Bosnia and Herzegovina (from December 1995 onward); (3) Albania (March–June 1997); (4) Kosovo (from June 1999 onward); (5) East Timor (October 1999–May 2002); and (6) Afghanistan (from December 2001 onward)”). As for Iraq, while withholding any semblance of approval of the military intervention, the Security Council has recognized that humanitarian rights and duties apply to the U.S. and U.K. forces occupying Iraq. S.C. Res. 1483, *supra* note 36, at pmb., ¶ 4.

42. For more on the Security Council’s expanding view on situations that pose “threat[s] to the peace” under Article 39, see generally Jon E. Fink, *From Peacekeeping to Peace Enforcement: The Blurring of the Mandate for the Use of Force in Maintaining International Peace and Security*, 19 MD. J. INT’L L. & TRADE 1, 7, 21–25, 41–46 (1995) (noting the Security Council’s increasing tendency to find threats to peace largely in internal conflicts raising humanitarian concerns, thus blurring the distinction between peacekeepers and peace enforcers); Frederic L. Kirgis, Jr., *The United Nations at Fifty: The Security Council’s First Fifty Years*, 89 AM. J. INT’L L. 506, 511–18 (1995) (surveying recent Security Council action under Article 39 and concluding that, while circumstances of late twentieth century might “lead unavoidably and quite properly to a much expanded definition of ‘threat to international peace’ than could have been intended fifty years ago,” the Security

the law of self defense,⁴³ particularly with respect to states that “acquiesce” in terrorist activity within their borders,⁴⁴ on the jurisdiction of states over a variety of activity and persons (including reviving notions of universal civil and criminal⁴⁵ jurisdiction⁴⁶), on alleged

Council should protect the legitimacy of its actions by “mak[ing] principled Article 39 determinations, publicly explicated, that do not set unlimited or unintended precedents.”); Alexander Orakhelashvili, *The Legal Basis of the United Nations Peace-Keeping Operations*, 43 VA. J. INT’L L. 485, 492–503 (2003) (articulating a more modern view of the Security Council’s power to invoke Article 39 in the context of peacekeeping operations).

43. Thomas Franck, for example, has repeatedly addressed the Security Council’s role in defining the proper scope of self-defense. See Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AM. J. INT’L L. 88, 101–06 (2006) (arguing, in the context of the U.S. invasion of Iraq that expansion of self-defense concepts to include preemptive strikes is not problematic in itself, but that approval of the Security Council is necessary to make such expansions legitimate); Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT’L L. 839 (2001) [hereinafter Franck, *Self-Defense*] (citing several Security Council resolutions in the wake of the September 11th attacks in support of the conclusion that U.S. use of force in Afghanistan was a legitimate exercise of the right of self-defense under Article 51). See also José E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT’L L. 873, 879–82 (2003) (discussing the possible impact of post 9/11 Council resolutions on the rules governing use of force and self defense).

44. See, e.g., S.C. Res. 1373, *supra* note 10, ¶ 2(a) (mandating that states “[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts” (emphasis added)); S.C. Res. 1368, ¶ 3, U.N. Doc. S/RES/1368 (Sept. 28, 2001) (emphasizing that “those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable” (emphasis added)); Franck, *Self-Defense*, *supra* note 43, at 840–41 (discussing whether a state may be held responsible for permitting use of its territory for terrorist acts, and citing Resolution 1368 in answering in the affirmative).

45. See, e.g., S.C. Res. 827, *supra* note 32 (establishing the ICTY); S.C. Res. 955, *supra* note 32 (establishing the ICTR).

46. The Security Council has also repeatedly urged states to join and to fully implement “relevant international conventions and protocols relating to terrorism,” which are designed in part to facilitate jurisdiction over, and prosecution of, terrorists and their associates in a given country or to ensure their extradition to a country that does have jurisdiction. S.C. Res. 1373, *supra* note 10, ¶¶ 3(d)–(e); see Terrorist Financing Convention, *supra* note 38, arts. 7, 9–11; International Convention for the Suppression of Terrorist Bombings, arts. 6–9, adopted Jan. 12, 1998, 37 I.L.M. 249, 256 (1998). Such assertions of jurisdiction have been of express importance to the Security Council. See S.C. Res. 1333, *supra* note 39, at pmb1. (“[r]ecalling the relevant international counter-terrorism conventions and in particular the obligations of parties to those conventions to extradite or prosecute terrorists”). The Security Council has also directly required actions by states that would often require a state to assert its jurisdiction over the persons, entities or items in question. See, e.g., S.C. Res. 1373, *supra* note 10, ¶¶ 1–2 (obligating states to take various steps to prevent terrorism and financing of terrorism, including freezing assets of terrorists and their associates, and “[e]nsur[ing] that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice” (emphasis added)).

norms such as the right to democratic governance⁴⁷ or an alleged “responsibility to protect,”⁴⁸ on the law of occupation,⁴⁹ on the legality of certain weapons⁵⁰ and on the expanding scope of international

47. The concept of a “right of democratic governance,” posited by Thomas Franck back in 1992, has been buoyed by the Security Council’s repeated efforts to provide election assistance and monitoring, not to mention its willingness to topple a military regime to restore Haiti’s legitimately-elected leader. See S.C. Res. 1483, *supra* note 36; S.C. Res. 940, *supra* note 10, ¶ 4. See also Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46 (1992) [hereinafter Franck, *Democratic Governance*]. Most recently, the Security Council has been active in supporting the emergence of a democratic regime in Iraq. See S.C. Res. 1511, ¶¶ 1–2, 4, 7–8, 11–15, U.N. Doc. S/RES/1511 (Oct. 16, 2003) (reinforcing Resolution 1483’s goal of representative government in Iraq by, among other things, inviting Iraq’s transitional government to provide the Security Council “a timetable and a programme for the drafting of a new constitution for Iraq and for the holding of democratic elections under that constitution,” to be implemented under the protection of a “multinational force” providing peace and security); S.C. Res. 1483, pmb1., ¶¶ 4, 8(c), 9, 16(b), 20–21, 23(b), U.N. Doc. S/RES/1483 (May 22, 2003) (recognizing “representative government” as a goal for Iraq, and providing both authority and means to the Secretary-General and the United States and United Kingdom as occupying powers to work towards an “internationally recognized, representative government” in Iraq); see also S.C. Res. 1500, U.N. Doc. S/RES/1511 (Aug. 14, 2003) (establishing United Nations Assistance Mission for Iraq to help Secretary-General fulfill his Resolution 1483 mandate of helping Iraqis achieve representative government); ALVAREZ, LAW-MAKERS, *supra* note 9, at 181–83 (discussing implications of Resolutions 1483 and 1511); Thomas D. Grant, *The Security Council and Iraq: An Incremental Practice*, 97 AM. J. INT’L L. 823 (2003) (providing observations on effect that various UN actions—in particular Resolutions 1483, 1500, and 1511—have had on Iraq’s transitional government and on furthering Security Council’s adopted goal of establishing representative government in Iraq).

48. Kristen Silverberg, Assistant Sec’y for Int’l Org. Affairs, U.S. Priorities to Strengthen the United Nations, Briefing in Washington, D.C. (Dec. 20, 2005), available at <http://statelists.state.gov/scripts/wa.exe?A2=ind0512c&L=dosdo&P=299> (stating that according to the U.S. Department of State, the “responsibility to protect” involves “first, the responsibility of nations to protect their own citizens and the responsibility of the international community, acting through the Security Council, to act in cases of genocide and other threats”). See also John R. Crook, *Contemporary Practice of the United States Relating to International Law*, 100 AM. J. INT’L L. 455, 463–64 (2006) (discussing U.S. support for exercising “responsibility to protect” through Security Council); G.A. Res. 60/1, ¶ 139, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) (supporting collective action through the Security Council and Chapter VII “should peaceful means be inadequate and national authorities are manifestly failing [sic] to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity”). The United States has also vowed to use its position on the Security Council to promote the tenets of the responsibility to protect. See Crook, *supra*, at 464.

49. For scholarship addressing the effect of the Iraq invasion and Security Council Resolution 1483 on occupation law, see generally Eyal Benvenisti, *The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective*, 1 ISR. DEF. FORCES L. REV. 19 (2003); Roberts, *supra* note 41, at 609–22; David J. Scheffer, *Beyond Occupation Law*, 97 AM. J. INT’L L. 842 (2003); Michael Ottolenghi, Note, *The Stars and Stripes in Al-Fardos Square: The Implications for the International Law of Belligerent Occupation*, 72 FORDHAM L. REV. 2177, 2200–18 (2004).

50. See, e.g., S.C. Res. 687, *supra* note 30, at ¶¶ 7–13 (showing Security Council

criminal law.⁵¹ And though the United States has been a principal mover and participant in the Council's normative activity, even the United States has not been able to control the resulting legal implications and today faces, for example, the broader legal ripples brought about by the consequent revival of international criminal law, including enhanced interest in command responsibility and universal jurisdiction.⁵²

The mission creep of international financial institutions—and the ever-expanding range of law affected by their activities—is ever more evident. The World Bank no longer sees itself as confined to financing infrastructure projects; its operational policies include such matters as the rights of those displaced by the projects that it funds.⁵³

“[i]nvit[ing]” Iraq to reaffirm its commitments under prior weapons treaties but, regardless of Iraq's decision to reaffirm its commitments, it went on to declare Iraq would give up all chemical or biological weapons, long-range ballistics missiles and materials for creating nuclear weapons that it might possess). The Security Council then looked beyond Iraq in stating that this portion of Resolution 687 “represent[ed] steps towards the goal of establishing in the Middle East a zone free from weapons of mass destruction and all missiles for their delivery and the objective of a global ban on chemical weapons.” *Id.* ¶ 14.

51. The Security Council has expanded the scope of international criminal law by: (1) adding to the substantive crimes recognized globally, *see* S.C. Res. 1373, *supra* note 10; S.C. Res. 1455, 1390, 1363, 1333, 1267, *supra* notes 38–39 and accompanying text; (2) encouraging the ready assertion of jurisdiction to prosecute such crimes, *see* S.C. Res. 1593, *supra* note 33, 1373 and accompanying text; G.A. Res. 60/1, *supra* note 48 and accompanying text; and (3) creating international tribunals to hear those crimes, *see* S.C. Res. 1593, 1483, 1272, *supra* notes 33, 36 and accompanying text.

52. The potential for using command responsibility and universal jurisdiction as vehicles for hauling U.S. peacekeepers before the ICC is one reason that the United States has opposed it. *See* American Servicemembers' Protection Act, 22 U.S.C. § 7427 (2006); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 706, 724–29 (2002) (discussing United States' refusal to become party to the Rome Statute and its efforts to secure immunity for U.S. personnel acting as U.N. peacekeepers abroad); David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 17–22 (1999) (reviewing flaws in Rome Statute, in particular its allowance for universal jurisdiction, that eventually prevented the United States from signing the treaty). The related issue of official immunity in domestic courts has also been of recent interest. *Compare* *R v. Bow St. Metro. Stipendiary Magistrate & Others, Ex Parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. 147, 203–05 (H.L. 1999) (U.K.) (finding that universal jurisdiction could be exercised over Pinochet because acts of torture violating *jus cogens* and the Torture Convention could not be considered state acts, meaning that Pinochet was not sheltered by official immunity), *with* *Arrest Warrant of 11 April 2000 (Congo v. Belg.)*, 2002 I.C.J. 3, 30 (Feb. 14) (finding issuance of warrant by domestic court against Congolese minister for international crimes “infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law”).

53. *See* WORLD BANK, OPERATIONAL DIRECTIVE 4.30: INVOLUNTARY RESETTLEMENT, ¶ 3 (June 1990), available at [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_Resettlement/\\$FILE/OD430_InvoluntaryResettlement.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_Resettlement/$FILE/OD430_InvoluntaryResettlement.pdf) (“The objective of the Bank's re-

The IMF—freed from patrolling fixed exchange rates—imposes structural adjustment loans that incorporate normative values, such as respect for the rule of law and property rights,⁵⁴ and even for an entitlement to “democratic governance.”⁵⁵ And a funny thing happens when such institutions are used to encourage “democracy” along Western lines: people begin to demand that those institutions themselves respect the rights of the governed by adapting techniques from national administrative law.⁵⁶ All of these institutions—including

settlement policy is to ensure that the population displaced by a project receives benefits from it.”); Laurence Boisson de Chazournes, *Policy Guidance and Compliance: The World Bank Operational Standards*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 281, 288–89 (Dinah Shelton ed., 2000) [hereinafter COMMITMENT AND COMPLIANCE]; Benedict Kingsbury, *Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples*, in THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE 323, 326 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999).

54. See, e.g., Andre Newburg, *The Changing Roles of the Bretton Woods Institutions: Evolving Concepts of Conditionality*, in INTERNATIONAL MONETARY LAW: ISSUES FOR THE NEW MILLENNIUM 81, 87–91 (Mario Giovanoli ed., 2000) (discussing and providing examples of the IMF’s “new” conditionality objectives, in particular “good governance” and promoting the rule of law). The legitimacy of the IMF forcing developing countries to “consent” to such conditions is a matter of debate. Compare John D. Ciorciari, *The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement*, 33 CORNELL INT’L L.J. 331 (2000) (arguing that imposing human rights conditions is legitimate to the extent that they “amount to an ‘economic concern’ under the IBRD and IDA Articles of Agreement,” and that international law dictates that concerns over fundamental human rights abuses cannot constitute an impermissible intrusion into domestic political affairs), with Daniel Kalderimis, *IMF Conditionality as Investment Regulation: A Theoretical Analysis*, 13 SOC. & LEGAL STUD. 104, 113–24 (2004) (“The original intent of the IMF to temporarily lend money to all nations to support a fixed exchange system does not sit comfortably with the IMF’s modern role of policing the adjustment of developing countries to market economies.”). For an in-depth analysis of the World Bank and the IMF’s use of human rights considerations, the legal basis for such considerations, and recommendations to further integrate the human rights agenda, see generally MAC DARROW, *BETWEEN LIGHT AND SHADOW: THE WORLD BANK, THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL HUMAN RIGHTS LAW* (2003).

55. See, e.g., Ciorciari, *supra* note 54, at 333 (noting that post-Cold War freedom of action “has enabled international financial institutions, led by the World Bank, to promote the principles of *liberal democracy* and free-market economics more vigorously than was previously possible” (emphasis added)). For an early discussion of the right to democratic governance, see generally Franck, *Democratic Governance*, *supra* note 47.

56. See, e.g., Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 37–42 (2005) (exploring benefits of applying various procedural and substantive aspects of domestic administrative law to international organizations); Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBS. 63 (2005) (exploring evaluating various methods of “drawing on U.S. administrative law in the development of a global administrative law to secure greater accountability” for international organizations); cf. ALVAREZ, *LAW-MAKERS*, *supra* note 9, at 244–48 (discussing similarities between interna-

UN specialized agencies and the WTO—find themselves under pressure, including by our government, to adopt mechanisms to encourage transparency, accountability, greater access for NGOs and legal responsibility.⁵⁷ There is even today an effort by the International Law Commission (ILC) to elaborate articles of responsibility for international organizations comparable to those it promulgated recently for state responsibility.⁵⁸ The international community is encouraging these organizations to become more legalized even as these organizations attempt to legalize others.

All of this suggests that international law is deepening both horizontally—as particular treaty regimes evolve with ever greater specificity—and vertically, as ever more intrusive forms for the national incorporation of its rules evolve, including within the United States itself.

To be sure, the U.S. government tries to confine these developments to those regimes that it believes serve its interests—such as trade and investment and their intrusive forms of dispute settlement—but it is becoming ever clearer that those regimes, which at our behest have developed some space for autonomous action, are not self-contained. As many have noticed, the emerging law of the WTO now deals with, and in turn has influenced, such matters as the rules of treaty interpretation⁵⁹ and the status of the precautionary

tional organizations and domestic agencies); Symposium, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 1 (2005).

57. See, e.g., ALVAREZ, LAW-MAKERS *supra* note 9, at 246, 248 (describing complaints—from both NGOs and industry supporters—that IOs have been “captured” by the other side, and accountability concerns over the scope of delegation of power to IOs and the “mission creep” of IOs like the World Bank and the IMF); cf. Kalderimis, *supra* note 54, at 103–04 (noting that IMF “reformed its policies in some key areas” in response to criticisms, including claims that it “excessively interfer[ed] in the economic sovereignty of developing countries” and later charges from U.S. economists that the IMF was “pursuing policies which do not work”).

58. See *International Law Commission, Responsibility of International Organizations*, in REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-EIGHTH SESSION, U.N. GAOR, 61st Sess., Supp. No. 10, at 246–92, U.N. Doc. A/61/10, (May 1–June 9 & July 3–August 11, 2006) (reporting on most recent version of draft articles on “Responsibility of International Organizations”).

59. See, e.g., John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to “Buy Out”?*, 98 AM. J. INT’L L. 109, 113 (2004) (pointing out the relative ease with which WTO dispute settlement bodies turn to preparatory works as part of treaty interpretation, despite subordinate role that such supplementary means of interpretation have under Vienna Convention on the Law of Treaties); Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT’L L. 535 (2001) (exploring relationship between WTO law and public interna-

principle in environmental law.⁶⁰ The WTO also serves to harden “soft” standards elaborated by the International Organization for Standardization (ISO) (through the TBT Agreement⁶¹) and the FAO-WHO’s (Food and Agriculture Organization; World Health Organization) Codex Alimentarius (through the SPS Agreement, among others⁶²), thereby triggering the attention of both business and consumer groups. The result is that those treaty regimes are now part of our domestic politics. The sunk costs that the United States has incurred in establishing the WTO and constructing a web of investment agreements has not merely tied the hands of subsequent administrations, Democrat and Republican, but it also created domestic audiences for supranational regulation and supervision.⁶³ The genie of

tional law, including aspects of treaty interpretation and concluding that the two have a close relationship involving “a continuing process of cross-fertilization” such that, “[j]ust as public international law enriches WTO law, so WTO law should further develop international law”).

60. See Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, ¶¶ 120–25, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998), available at http://www.wto.org/english/tratop_e/dispu_e/repertory_e/w3_e.htm (recognizing that precautionary principle is embodied in Article 5.7 of the SPS Agreement and that “a panel charged with determining, for instance, whether ‘sufficient scientific evidence’ exists to warrant the maintenance by a Member of a particular SPS measure” may consider the possibility of such a Member’s rightful recourse to the precautionary principle); see also Hans-Joachim Priess & Christian Pitschas, *Protection of Public Health and the Role of the Precautionary Principle Under WTO Law: A Trojan Horse Before Geneva’s Walls?*, 24 *FORDHAM INT’L L.J.* 519 (2000) (surveying use of precautionary principle generally and before WTO in particular before recommending that WTO members exercise caution in relying on the principle); David A. Wirth, *The Role of Science in the Uruguay Round and NAFTA Trade Disciplines*, 27 *CORNELL INT’L L.J.* 817, 838–40 (1994) (providing brief discussion of precautionary principle and its mention in SPS Agreements).

61. See Agreement on Technical Barriers to Trade, arts. 2.4, 2.9, Annex 1 ¶ 2, Apr. 15, 1994, 1868 U.N.T.S. 120 [hereinafter TBT] (making compliance with ISO standards the default rule for ensuring that technical regulations satisfy TBT requirements); see also Naomi Roht-Arriaza, ‘Soft Law’ in a ‘Hybrid’ Organization: *The International Organization for Standardization*, in *COMMITMENT AND COMPLIANCE*, supra note 53, at 263 (providing general description of ISO and standards it promulgates); and David A. Wirth, *Compliance with Non-Binding Norms of Trade and Finance*, in *COMMITMENT AND COMPLIANCE*, supra note 53, at 330, 339–40 (discussing TBT’s incorporation of ISO standards).

62. See WTO Agreement on the Application of Sanitary and Phytosanitary Measures, art. 3(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, available at http://www.wto.org/English/tratop_e/sps_e/spsagr_e.htm [hereinafter SPS] (declaring that “[s]anitary or phytosanitary measures which conform to international standards, guidelines or recommendations”—such as the FAO-WHO’s Codex Alimentarius—are presumed consistent with relevant GATT and SPS provisions). For a description of the FAO-WHO’s Codex Alimentarius and the legal weight of complying with its standards, see generally ALVAREZ, *LAW-MAKERS*, supra note 9, at 222–23.

63. See generally John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 *HARV. L. REV.* 511 (2000) (analyzing the optimum structure of the WTO for pur-

supranational scrutiny over U.S. law is now out of its bottle as well and will prove difficult to contain.

Our law is also being internationalized by our decisions, albeit in discrete areas, to permit supranational adjudicators to “complete” our treaty-contracts, as in the trade regime.⁶⁴ Consider four techniques whereby WTO adjudicators blur the line between “trade” law and wider “public” international law, thereby preventing WTO law from being read in “clinical isolation” from general international law.⁶⁵

(1) *The customary principles of compétence de la compétence and of effectiveness.*

The fact that WTO adjudicators, like all international judges and arbitrators, have the inherent authority to determine the scope of their own jurisdiction,⁶⁶ and that they are under pressure to give effect to the rights that they are charged with protecting, has proven to be a tool that has broadened the scope of the trade regime. The customary principles of *compétence de la compétence* and effectiveness lie behind such WTO decisions as those which give content to nullification and impairment complaints in the WTO where there is no

poses of avoiding capture by protectionist groups, which include NGOs and domestic special interests that have become increasingly vocal concerning world trade issues).

64. See, e.g., Joel Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333 (1999) (discussing gap-filling role of WTO dispute settlement bodies, including a perspective of incomplete contracts theory of law and economics); cf. MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 28 (Univ. of Chicago Press 1981) (“Nearly all contemporary students of courts agree that courts do engage in at least supplementary and interstitial lawmaking, filling in the details of the statutory or customary law.”).

65. See, e.g., Pauwelyn, *supra* note 59, at 577 (“[T]he WTO treaty, WTO panels, and the Appellate Body were not only created in the wider context of public international law; they continue to exist in that context.”); cf. Trachtman, *supra* note 64, at 376 (“While present WTO law seems clearly to exclude direct application of non-WTO international law, this position seems unsustainable as increasing conflicts between trade values and non-trade values arise.”).

66. See Appellate Body Report, *United States—Anti-Dumping Act of 1916*, ¶ 54 n.30, WT/DS136/AB/R, WT/DS162/AB/R (Aug. 28, 2000) (mentioning in discussion of panel’s jurisdictional analysis that “it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it.”); Pauwelyn, *supra* note 59, at 555–56 (noting that once WTO dispute panel is seized of a matter, it has the power to determine whether dispute falls within its substantive jurisdiction).

explicit violation of the covered agreements (as in *Japan Film* (1998)).⁶⁷ *Japan Film* also draws implicitly from broad notions of state responsibility since it found that even non-binding actions taken by a government, such as state incentives and disincentives or administrative guidance that structure the actions of private parties that in turn impair General Agreement on Tariffs and Trade (GATT) rights, can trigger a judicial response.⁶⁸ The principles of *compétence de la compétence* and of effectiveness hand WTO adjudicators a tool with which to expand the scope of their decisions and the law that they consider. This is also suggested by decisions that use preambular language in the GATT agreements to suggest that the regime embraces other goals apart from the liberalization of trade flows.⁶⁹

- (2) *The alleged general principle that international adjudicators should avoid determinations of non-liquet, i.e., that no law applies to resolve a dispute.*

The general disinclination to issue a finding of non-liquet fuels the reach for non-WTO principles to fill in the interpretative and other inevitable gaps in WTO law. It remains anathema for judges (or international law scholars) to proclaim that there is no law.⁷⁰ A

67. Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper*, ¶¶ 10.36, WT/DS44/R (Mar. 31, 1998) [hereinafter *Japan Film*] (reaffirming non-violation remedy as “an important and accepted tool of WTO/GATT dispute settlement” to be “approached with caution”); see also Trachtman, *supra* note 64, 369–75 (discussing *Japan Film* and the relatively narrow approach it takes to nullification and impairment claims). For other WTO adjudications providing content to claims, rights, obligations and remedies falling within scope of WTO trade law, see generally ALVAREZ, LAW-MAKERS, *supra* note 9, at 468–69.

68. See *Japan Film*, *supra* note 67, ¶¶ 10.52 (recognizing that proper non-violation complaint could be based on private actions when those actions are “nonetheless . . . attributable to a government because of some governmental connection to or endorsement of those actions”).

69. See, e.g., Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 129–31, 150–59, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp Turtle*] (relying on preamble of WTO Agreement, including its “objective of sustainable development,” to hold that evaluating an exception to Article XX required panel to apply a balancing test to weigh the rights of the party claiming the exception against the party alleging violation of other substantive rights of the GATT 1994). This case-by-case balancing test leaves room for a panel to allow policy concerns to temper its deliberations. See ALVAREZ, LAW-MAKERS, *supra* note 9, at 471; Trachtman, *supra* note 64, at 362–64.

70. See *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 127–37 (Oct. 2, 1995) (quashing potential non-liquet situation by ruling that individual criminal responsibility for war crimes in internal

declaration of non-liquet would be in the views of most a defeat for the dispute settlement system as well as for the general hopes of constructing a rule-oriented regime not dependent on power.

(3) *The self-perceived role of international judges and the procedural rules that they fashion.*

The need to produce a reasoned opinion,⁷¹ the pull of precedent,⁷² the need to feel a part of the “invisible college,”⁷³ and the need for self-legitimation help fuel the drive for WTO adjudicators to reach for general rules of international law.⁷⁴ This underlies WTO

conflict situations could be had through Nuremberg precedent and customary international law); SIR HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE* 66–67 (1958); Ernst-Ulrich Petersmann, *How to Promote the International Rule of Law?—Contributions by the World Trade Organization Appellate Review System*, 1 J. INT’L ECON. L. 25, 32–33 (1998) (giving examples of international organizations concluding that, “in international law, there are no no-law situations” (emphasis added)); Prosper Weil, *“The Court Cannot Conclude Definitively . . .” Non Liquet Revisited*, 36 COLUM. J. TRANSNAT’L L. 109, 110 (1997) (“The view prevailing among writers is that there is no room for non liquet in international adjudication because there are no lacunae in international law.”).

71. See generally, ALVAREZ, *LAW-MAKERS*, *supra* note 9, at 554–58 (discussing significance of the issuance of a reasoned opinion within the context of international tribunals).

72. Professor Raj Bhala has extensively chronicled the use of precedent by WTO adjudicative bodies, arguing that the de facto form of stare decisis that the WTO practices but disclaims should give way to de jure stare decisis formalized by amending the covered agreements. See Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT’L L. REV. 845 (1999); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 FLA. J. TRANSNAT’L L. & POL’Y 1 (1999) [hereinafter Bhala, *The Precedent Setters*]; Raj Bhala, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, 33 GEO. WASH. INT’L L. REV. 873 (2001).

73. Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. U. L. REV. 217 (1977) (observing that community of international lawyers “constitutes a kind of invisible college dedicated to a common intellectual enterprise,” and describing how that community’s influence extends beyond scholarship into “the sphere of government” and into shaping principles of international law).

74. Compare Trachtman, *supra* note 64, at 362–64 (praising Appellate Body’s *Shrimp Turtle* decision for “aggregat[ing] substantial power to itself” to deal with clashes between environmental law and trade law, and noting that the failure of WTO members to work out rules addressing the sustainable development issue “reinforces at least the legitimacy of the dispute resolution process doing so”), with McGinnis & Movsesian, *supra* note 63, at 592–94 (criticizing *Shrimp Turtle* Appellate Body for placing an implied duty to negotiate on WTO members who wish to claim an Article XX exception, arguing that dispute body review of the “serious[ness]” of such negotiations would be an illegitimate exercise of power). Trachtman points out that the *Shrimp Turtle* Appellate Body relied on the Inter-American Convention when formulating its balancing test: he posits that “[p]erhaps the Appellate

adjudicators' recourse to alleged principles of international judicial procedure such as waiver,⁷⁵ the principle of *in dubio mitius* (to interpret international obligations in deference to state power whenever possible),⁷⁶ conceptions of legal standing to file a complaint (as in *Bananas*),⁷⁷ notions of what constitutes a "redressable injury,"⁷⁸ and when such complaints are either "moot" or "ripe,"⁷⁹ or the application of other "passive virtues" such as the principle of judicial economy (that is, deciding only the narrowest set of questions necessary to issue a decision).⁸⁰

Body felt the need to support its standard-based balancing test determination with this reference to a treaty rule-based determination." Trachtman, *supra* note 64, at 363.

75. See Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶¶ 164–88, WT/DS27/AB/R (Sept. 9, 1997) [hereinafter *EC—Bananas*] (revising panel body's interpretation of the waiver provision in Lomé Convention but rejecting parties' argument that panel was incompetent to determine scope of waiver). See also, e.g., David Palmetier & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 398, 412–13 (1998) (discussing *EC—Bananas* decisions on waiver).

76. See Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, ¶ 165 & n.154, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (invoking *in dubio mitius* to reject panel interpretation of Article 3.1 of SPS Agreement to give international guidelines and standards binding effect). *But cf.* Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 260 (2004) (noting *EC—Beef Hormones* as single instance in which the Appellate Body relied on *in dubio mitius*, but reasoning that the Appellate Body's general avoidance of *in dubio mitius* is greater proof that it "has not shied away from filling gaps and clarifying ambiguities").

77. See *EC—Bananas*, *supra* note 75, ¶¶ 132–38 (upholding panel's ruling that "legal interest" is not necessary to have "standing" to request WTO dispute settlement panel); Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶¶ 7.47–7.52, WT/DS27/R/ECU, WT/DS27/R/GTM, WT/DS27/R/MEX, WT/DS27/R/USA (May 22, 1997). See also RAJ BHALA, *INTERNATIONAL TRADE LAW: THEORY AND PRACTICE* 231–32 (2d ed. 2001) [hereinafter BHALA, *INTERNATIONAL TRADE LAW*] (discussing *Bananas* ruling on "standing" question); John P. Gaffney, *Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System*, 14 AM. U. INT'L L. REV. 1173, 1209–11 (1999) (analyzing dispute settlement body rulings concerning standing); Lawrence D. Roberts, *Beyond Notions of Diplomacy and Legalism: Building a Just Mechanism for WTO Dispute Resolution*, 40 AM. BUS. L.J. 511, 537 (2003) (noting breadth of WTO's conception of standing).

78. *Cf.* Peter Lichtenbaum, *Procedural Issues in WTO Dispute Resolution*, 19 MICH. J. INT'L L. 1195, 1211–12 (1998) (analogizing redressable injury requirement under U.S. law to ability under DSU Article 22 mechanism for member to receive compensation for its lost trade opportunities).

79. See BHALA, *INTERNATIONAL TRADE LAW*, *supra* note 77, at 232–33 (reviewing various WTO decisions relating to ripeness and mootness); Lichtenbaum, *supra* note 78, at 1213–20 (same).

80. See Appellate Body Report, *Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, at 17–20, WT/DS33/AB/R (Apr. 25, 1997) (observing that GATT 1947

(4) *The customary or Vienna rules of treaty interpretation.*

The open-texture of the traditional rules of treaty interpretation in the Vienna Convention on the Law of Treaties, Articles 31–32 (for example, the ambiguities of “plain meaning,” “in good faith,” “object and purpose” and especially Article 31(3)(c)’s license to consider “relevant rules of international law”⁸¹) all provide opportunities for reaching to substantive international law not normally regarded as embraced by the WTO covered agreements.

While these four techniques or principles have not turned WTO panels into courts of general jurisdiction, and the resort to non-trade law remains considerably limited, few now claim that the trade regime exists in “clinical isolation” from the rest of international law.⁸²

Similar things are happening in other international tribunals. Responsible arbitrators and judges are likely to reach to rules outside the regime directly at issue in part because of their own felt need to harmonize their decisions with others reached elsewhere. Like WTO and investor-state adjudicators, they too have common institutional needs to ensure certainty and predictability.⁸³ Reliance on general international legal principles and other forms of “soft law” is one way to achieve this.

panels, as well as past and more recent WTO panels, “have refrained from examining each and every claim made by the complaining party and have made findings only on those claims that such panels concluded were necessary to resolve the particular matter”); Panel Report, *Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, ¶ 6.6, WT/DS33/R (Jan. 6, 1997) (rejecting India’s attack on judicial economy doctrine). See generally William J. Davey, *Has the WTO Dispute Settlement System Exceeded Its Authority?*, 4 J. INT’L ECON. L. 79 (2001) (concluding from study of thirty-eight adopted decisions that WTO appellate bodies and panels are sufficiently restrained in their exercises of authority, and addressing WTO precedent on various avoidance doctrines, including standing, political question and judicial economy, among others).

81. Vienna Convention on the Law of Treaties arts. 31–32, May 23, 1969, 1155 U.N.T.S. 331.

82. For a more detailed account of how all of these principles serve both to expand and to limit the jurisdiction of WTO adjudication, see José E. Alvarez, *The Factors Driving and Constraining the Incorporation of International Law*, in *THE WTO AT TEN: GOVERNANCE, DISPUTE SETTLEMENT, AND DEVELOPING COUNTRIES* (Merit Janow ed., 2007).

83. See generally Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 AM. J. INT’L L. 474, 497–505 (1991) (analyzing “preference of arbitrators for judicial and arbitral precedents as sources of international law” and surmising that this results from the perception that “precedents have greater legitimacy, integrity and determinacy than other available sources”).

The fact that trade and investment regimes are not self-contained has another consequence. To the extent WTO or International Centre for Settlement of Investment Disputes (ICSID) adjudicators deploy general public international law, they necessarily affect it. The WTO's Appellate Body's *Shrimp Turtle* decision is a landmark not only because that Body showed an acute awareness of the interconnections between WTO *lex specialis* and the rest of international law.⁸⁴ That Body's extraordinary suggestion that the United States may have erred in not negotiating multilaterally prior to taking unilateral action has inspired considerable re-thinking by international lawyers far afield from trade.⁸⁵ To many, it suggests that there is now an emerging duty to cooperate or even to negotiate multilaterally—whether with respect to landmines or the elimination of weapons of mass destruction.⁸⁶ In other words, state actions that impinge on the rights of other states or of the international community need to show a decent respect for those others and cannot be the product of unilateral fiat. This idea has considerable bite and much transformative potential. Whatever we may think of this aspect of *Shrimp Turtle*—and it has been criticized by some commentators as unjustified judicial activism⁸⁷—that this suggestion was made in the course of a binding WTO decision and not by the ICJ matters less than the extraordinary fact that it was addressed to the world's "hyper-power." Even if we do not think that the WTO Appellate Body got the law right, we can scarcely deny that *Shrimp Turtle*, like many other decisions being issued by our proliferating international judiciary, has had a legal and political impact beyond the parties most immediately affected.

84. See *Shrimp Turtle*, *supra* note 69, ¶¶ 130, 132, 135, 167–71 (relying on various non-WTO international conventions to support its interpretation of Article XX's reference to "exhaustible natural resources" and to justify the balancing test it concluded was applicable to analyze a challenged article XX measure). See also ALVAREZ, *LAW-MAKERS*, *supra* note 9, at 471 ("[The *Shrimp Turtle* appellate body] suggested that interests outside the four corners of the WTO Agreement may be relevant to its interpretation . . .").

85. See, e.g., Pierre-Marie Dupuy, *The Place and Role of Unilateralism in Contemporary International Law*, 11 EUR. J. INT'L LAW 19, 22–23 (2000) (suggesting that there is a general duty to cooperate or negotiate and not merely within the WTO regime).

86. See *id.*

87. See, e.g., McGinnis & Movsesian, *supra* note 63, at 592–94. Cf. Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENVTL. L. 491, 507–10 (2002) ("[T]he AB was not incorporating into the chapeau a duty to negotiate from international environmental law. It was merely using a baseline from international environmental law to determine whether, in the circumstances, the discriminatory behavior of the U.S. was also unjustifiable.").

As the WTO example suggests, the U.S. executive branch finds itself increasingly subject to an interlocking set of multilateral processes from which it cannot—and does not wish to—extricate itself. To be sure, U.S. national law is not as dramatically affected by these regimes as are the laws of say, a poor African country, which has had to respond not only to the demands of the Security Council but is also on the receiving end of IMF structural adjustment conditions and therefore needs to respond to World Bank operational policies if it is to have access to Bank funds. In all of these regimes, the United States is more law-giver than law-taker.⁸⁸

But even such a law-giver—a privileged nation with a Council veto, weighted voting rights in the World Bank and IMF, and substantial WTO trade leverage—cannot totally control legal outcomes in any of these fora precisely because these venues' continued legitimacy depends on it. Compromises are always necessary to secure everything from a Chapter VII Council resolution to a favorable IMF decision with respect to a reliable U.S. ally. Nor can the U.S. government control the internal political reactions prompted by these institutions—including internal political alliances formed between proponents and opponents of these regimes. And of course, the United States cannot wholly control the institutions themselves, which enjoy a degree of autonomy resulting from the necessary delegation of powers or functions to “independent civil servants,” adjudicators, or technocrats.

Even the powerful United States cannot avoid the cumulative impact of WTO panel and Appellate Body decisions, even if these are neither self-executing nor the subject of claims in federal court.⁸⁹

88. Compare Brigitte Stern, *Custom at the Heart of International Law*, 11 DUKE J. COMP. & INT'L L. 89, 102–08 (2001) (observing that, with little exception, “customary rule seems always to result from the actions of an active majority—or even of a *very powerful and active minority*—which is able to impose its views on all other states . . .” (emphasis added)), with Stephen Toope, *Powerful but Unpersuasive? The Role of the United States in the Evolution of Customary International Law*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 287 (Michael Byers & Georg Nolte eds., 2003) (recognizing that “[m]ajor powers collectively can contribute more significantly to the formation of custom than can weak States,” but arguing that, individually, “the United States does not and cannot play a uniquely dominating role in the shaping of customary international law, even though its material power is preponderant in contemporary world society”).

89. See *Corus Staal BV v. U.S. Dep't of Commerce*, 27 Ct. Int'l Trade 386, 399 (2003) (“WTO decisions are not binding upon . . . the court.” (citing *Hyundai Elec. Co. v. United States*, 23 Ct. Int'l Trade 302, 311 (1999); *Footwear Distributions & Retailers of Am. v. United States*, 18 Ct. Int'l Trade 391 (1994))); Uruguay Round Agreements, Statement of Adminis-

Over time, U.S. law, such as the residual application of section 301 of the U.S. Trade Act—like the law of all WTO members—is likely to reflect the WTO’s evolving views.⁹⁰ Eventually, WTO law on discrimination against goods may become as sophisticated as and even come to influence the interpretation of the U.S. Commerce Clause⁹¹—as much as, for example, U.S. takings jurisprudence may come to be affected by the emerging jurisprudence of NAFTA Chapter 11 investor-state arbitral decisions.⁹² In addition, the impact of

trative Action, H.R. Doc. No. 103-316, pt. 1, at 1032-33 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4318.

90. A WTO panel found that sections 301-310 of the U.S. Trade Act were consistent with U.S. obligations under DSU Article 23 largely because the United States, in domestic legislative history and statements before the panel, unequivocally averred that the U.S. Trade Representative would “base any section 301 determination that there has been a violation or denial of U.S. rights under the relevant agreement on the panel or Appellate Body findings adopted by the DSB.” Panel Report, *United States—Sections 301-310 of the Trade Act of 1974*, ¶¶ 7.110-7.126, WT/DS152/R (Dec. 22, 1999) [hereinafter *Trade Act*] (emphasis added) (quoting H.R. Doc. No. 103-316, *reprinted in* 1994 U.S.C.C.A.N. at 4320). Judicial application of the *Charming Betsy* presumption also works to bring U.S. law in line with WTO interpretations. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”); see also, e.g., *Hyundai Elecs. Co.*, 53 F. Supp. 2d at 1343-45 (Ct. Int’l Trade 1999) (applying *Charming Betsy* presumption to construe U.S. Department of Commerce regulation consistently with Antidumping Agreement).

91. See, e.g., Stephen E. Draper, *The Unintended Consequences of Tradable Property Rights to Water*, 20 NAT. RESOURCES & ENV’T, Summer 2005, at 49, 54 (noting, in context of markets for trading rights to water, that “[t]rade agreements like the North American Free Trade Agreement (NAFTA) and those sanctioned by the World Trade Organization (WTO) could aggravate the reach of the Commerce Clause” by nullifying water-transfer restrictions imposed by U.S. states). Many scholars have recognized similarities between the WTO system and jurisprudence under the dormant Commerce Clause. See, e.g., David Barnhizer, *Waking from Sustainability’s “Impossible Dream”: The Decisionmaking Realities of Business and Government*, 18 GEO. INT’L ENVTL. L. REV. 595, 609-10 (2006) (“The system incorporated into GATT and the WTO therefore operates much like the Commerce Clause of the U.S. Constitution”); Daniel A. Farber & Robert Hudec, *Free Trade and the Regulatory State: A GATT’s Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401 (1994) (comparing operation of dormant Commerce Clause with that of GATT legal system); Peter M. Gerhart, *The Two Constitutional Visions of the World Trade Organization*, 24 U. PA. J. INT’L ECON. L. 1, 39 (2003) (“The dormant Commerce Clause performs in a federal system the same function that the WTO performs in the international system—to make it harder for lawmaking sovereigns to devalue or ignore the effect of policy on others.”); Darren M. Springer, *Reimagining the WTO: Applications of the New Deal as a Means of Remediating Emerging Global Issues*, 29 VT. L. REV. 1067, 1087 (2005) (“The WTO attempts to eliminate barriers to trade, and in this way, it is similar to the dormant commerce clause of the U.S. Constitution.”).

92. See *Roundtable Discussion on Domestic Challenges If Multilateral Investment Treaties Are Interpreted to Expand the Compensation Requirement for Regulatory Expropriations Beyond a Signatory State’s Domestic Law*, 11 N.Y.U. ENVTL. L.J. 208, 221-25 (2002) [hereinafter *Roundtable*] (discussing the potential of NAFTA expropriation law to

these supranational regimes may come to be felt by changes in national law that do not occur—because of the regulatory “chill” posed by the prospect that new laws will be challenged in the WTO or in investor-state arbitrations.⁹³ Moreover, the fact that the U.S. government has permitted a degree of supranational scrutiny over some domains (trade and investment) but not others (human rights and the environment) has not gone unnoticed, and makes it increasingly untenable for our government to proclaim that such possibilities are “extra-constitutional.”⁹⁴

influence domestic takings law); *cf.* John D. Echeverria, *From a “Darkling Plain” to What?: The Regulatory Takings Issue in U.S. Law and Policy*, 30 VT. L. REV. 969, 985 (2006) (recognizing the importance of long-term issues concerning interaction between domestic and international takings law). *See also* ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW*, 486–88 (2003) (discussing the likely impact of BITs and arbitrations under them to develop customary law); Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 AM. J. INT’L L. 474, 474–75, 497–505 (1991) (analyzing the increasing influence of international tribunal decisions on customary law of expropriation, positing that these decisions are treated as “more authoritative sources of law than the officially expressed views of a majority of states in the General Assembly”).

93. *See, e.g.*, Lucien J. Dhooge, *The Revenge of the Trail Smelter: Environmental Regulation as Expropriation Pursuant to the North American Free Trade Agreement*, 38 AM. BUS. L.J. 475, 478–80, 541–51 (2001) (analyzing *Methanex* case and concluding that “the consequences for future national and local environmental regulation arising from such claims are nothing short of disastrous”); Matthew C. Porterfield, *International Expropriation Rules and Federalism*, 23 STAN. ENVTL. L.J. 3, 68–90 (2004) (contending that state and local governments might be pressured to conform their laws to NAFTA expropriation norms or, alternatively, that NAFTA expropriation decisions could prompt federal preemption of inconsistent state and local laws); *Roundtable, supra* note 92, at 220, 234 (quoting Lori Wallach, of Public Citizen, on possible chilling effect that NAFTA cases like *Ethyl Corp.* could have on state and local regulations).

94. The United States’ willingness to be bound by the strictures of the WTO and NAFTA systems contrasts markedly with its approach to human rights and environmental regimes. From its non-accession to Kyoto to its long-delayed ratification of the ICCPR, the United States has repeatedly shown its reluctance to join multilateral human rights and environmental agreements in the first place. Even when the United States does join such treaty regimes, it is far more accommodating to the rulings of WTO panels and NAFTA tribunals than it is to efforts by treaty institutions to protect noneconomic rights. *Compare Trade Act, supra* note 90, ¶¶ 7.110–7.126 (discussing United States’ express willingness to subjugate determinations under Section 301 of the Trade Act to “panel or Appellate Body findings adopted by the DSB”), *with* U.S. Observations on General Comment No. 24, *supra* note 25, at 126–27 (pointing out that ICCPR “does not impose on States Parties an obligation to give effect to the [Human Rights] Committee’s interpretations or confer on the Committee the power to render definitive or binding interpretations of the Covenant”); *see also* Letter from Condoleezza Rice, *supra* note 5 (withdrawing the United States from the Optional Protocol to Vienna Convention on Consular Relations, shortly after the ICJ’s 2004 ruling in *Avena*). Given the ability of WTO and NAFTA institutions to pass judgment on the laws and adjudicative processes of the United States, it becomes less plausible to accuse entities like the ICJ

II.

There is yet another reason for the internationalization of U.S. law beyond the mission creep of our favored institutions: the re-emergence of customary law. Now at this point, I expect several of you to conclude that I really must be hallucinating. Haven't I heard from well-known U.S. revisionist scholars that customary international law is of no real relevance to the behavior of states;⁹⁵ that it ought to have no status as federal common law;⁹⁶ that it is subject to hopeless circularity in terms of definition;⁹⁷ and that in game-theoretic terms it is a collective delusion routinely ignored when not consistent with the national interests of states?⁹⁸ Well yes, actually I have heard these arguments by Curtis Bradley, Jack Goldsmith, and Eric Posner, among others. I just think they need to get out more and take a stroll, for example, in the real world of practicing lawyers where real cases are won or lost. They need to take a close look at, for example, U.S. government or U.S. investor briefs in NAFTA arbitrations.

My foreign investment students have a difficult time under-

of being unconstitutional. *See, e.g.*, A. Mark Weisburd, *International Courts and American Courts*, 21 MICH. J. INT'L L. 877, 893-931 (2000) (arguing that the U.S. Constitution bars international bodies like the ICJ from reviewing federal and state court decisions and from compelling compliance from such courts).

95. *See* JACK L. GOLDSMITH & RICHARD A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 39, 43 (2005) (using rational choice theory to conclude that, among other things, customary international law "is not an exogenous influence on state behavior"); Jack L. Goldsmith & Eric Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639, 641 (2000) ("CIL as an independent normative force has little if any effect on national behavior."). *See generally* Kenneth Anderson, *Remarks By An Idealist on the Realism of the Limits of International Law*, 34 GA. J. INT'L & COMP. L. 253 (2006) (presenting scholarly work reacting to Goldsmith and Posner's book).

96. *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, 816 (1997) (arguing that "in the absence of authorization by the federal political branches, customary international law should not have the status of federal law").

97. *See* Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT'L L. 149, 172 (2006) ("This circularity problem tends to afflict customary international law generally."); *cf.* Jianming Shen, *Reflections on D'Amato's "Reformulation" of Customary International Law*, in 4 INT'L LEGAL THEORY 25, 26 (1998) (discussing authors who feel *opinio juris* is too circular to be useful).

98. *See* GOLDSMITH & POSNER, *supra* note 95 (using game theory to support the conclusion that state action is driven by national self-interest, not norms of customary international law); Jack L. Goldsmith & Eric Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999).

standing those who say that customary law does not exist or cannot bind. They certainly do not understand how such arguments can be made by those who simultaneously defend—in preference to supposedly “imprecise,” “ineffectual” customary law—the “hard” or more binding rules and institutions of international economic law such as bilateral investment treaties, free trade agreements such as the NAFTA or the WTO.⁹⁹

They have a tough time understanding such contentions because even a cursory examination of the abundant case law of BIT and NAFTA tribunals reveal considerable reliance on rules of custom as well as general principles of law. The substantive guarantees provided in even relatively precise investment agreements anticipate, indeed require, reliance on these other sources of general international law outside the four corners of international trade or investment law narrowly construed. As the emerging arbitral case law suggests, provisions requiring investors to receive “fair and equitable treatment,” “full protection and security,” treatment that is not less than required “under international law,” or requiring states to respect investor-state contracts are recipes for dredging through hoary cases dealing with state responsibility to aliens (such as *Chattin*¹⁰⁰ or *Neer*¹⁰¹); more recent considerations of what constitutes fair or equitable procedures (as in human rights tribunals that apply both treaty and customary standards¹⁰²); and comparative analyses of the general principles of law that can be drawn from national law (such as national law protecting the legitimate expectations of rights holders¹⁰³). The custom-

99. See, e.g., J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449 (2000) (criticizing the continued viability of this source of international law in light of the prevalence of “hard” treaties); John O. McGinnis, *The Comparative Disadvantage of Customary International Law*, 30 HARV. J.L. & PUBL. POL'Y 7 (2006) (criticizing customary law from a number of perspectives, including efficiency).

100. B.E. Chattin (U.S. v. Mex.), 4 R. Int'l Arb. Awards 282 (U.S.-Mex. Gen. Cl. Comm'n 1927); see also Don Wallace, Jr., *Fair and Equitable Treatment and Denial of Justice: Loewen v US and Chattin v Mexico*, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 669 (Todd Weiler ed., 2005) (discussing the traditional denial of justice principles espoused by *Chattin*, as well as the modern application of denial of justice in the *Loewen* case).

101. L.F.H. Neer (U.S. v. Mex.), 4 R. Int'l Arb. Awards 60 (U.S.-Mex. Gen. Cl. Comm'n 1926), available at http://untreaty.un.org/cod/riaa/cases/vol_IV/60-66.pdf.

102. See *infra*, note 108 and accompanying text (discussing the Inter-American Court of Human Rights); *infra*, note 138 and accompanying text (discussing the European Court of Human Rights).

103. See, e.g., LORI F. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS

ary “denial of justice” standard is being used in many of these investment disputes, as are general principles of estoppel, unclean hands and acquiescence.¹⁰⁴ States trying to defend themselves from investors’ claims, such as Argentina, find themselves parsing the customary international law defenses of distress, necessity or force majeure, as well as the rules concerning attribution.¹⁰⁵ Despite recent Argentine threats not to abide by ICSID rulings,¹⁰⁶ no one questions that such arbitral awards are among the most effectively enforceable in the international system, even when these decisions are contrary to

124 (4th ed. 2001) (noting tribunals’ recognition of “protection of legitimate expectations” as general principle); John Temple Lang, *Legal Certainty and Legitimate Expectations as General Principles of Law*, in GENERAL PRINCIPLES OF EUROPEAN COMMUNITY LAW 163 (Ulf Bernitz & Joakim Nergelius eds., 2000) (discussing legitimate expectations as general principle of law in European Community). National standards like legitimate expectations also receive international application via express incorporation into BITs. See, e.g., United States-Chile Free Trade Agreement, U.S.-Chile, Annex 10-D, para. 4(a)(ii), June 6, 2003, available at http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html (listing, as pertinent to a finding of expropriation under treaty, *Penn Central* factors including “the extent to which the government action interferes with *distinct, reasonable investment-backed expectations*” (emphasis added)); United States-Singapore Free Trade Agreement, U.S.-Sing., Exchange of Letters on Expropriation, para. 4(a)(ii), Jan. 15, 2003, available at http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/Section_Index.html (same); cf. Matthew C. Porterfield, *International Expropriation Rules and Federalism*, 23 STAN. ENVTL. L.J. 3, 60–61 (2004) (opining that inclusion of *Penn Central* language in Singapore and Chile free trade agreements will not necessarily cause foreign investor rights to be interpreted comparably).

104. See, e.g., DAMROSCH ET AL., *supra* note 103, at 124; Genc Trnavci, *The Meaning and Scope of the Law of Nations in the Context of the Alien Torts Claims Act and International Law*, 26 U. PA. J. INT’L ECON. L. 193, 213 n.88 (2005); cf. Jack J. Coe, Jr., *The Serviceable Texts of International Commercial Arbitration: An Embarrassment of Riches*, 10 WILLAMETTE J. INT’L L. & DISP. RESOL. 143, 153 n.45 (2002) (listing legal arguments made by claimant in *Metalclad*, including “customary theories such as administrative denial of justice” and claims drawn from general principles such as estoppel).

105. See, e.g., CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, 44 I.L.M. 1205 (May 12, 2005) (rejecting Argentina’s necessity and other defenses in claim for losses stemming from Argentina’s economic crisis); Paolo Di Rosa, *The Recent Wave of Arbitrations Against Argentina Under Bilateral Investment Treaties: Background and Principal Legal Issues*, 36 U. MIAMI INTER-AM. L. REV. 41, 65–68 (2004) (exploring viability of Argentina claiming necessity or emergency as defense); Erik J. Woodhouse, *The Obsolescing Bargain Redux? Foreign Investment in the Electric Power Sector in Developing Countries*, 38 N.Y.U. J. INT’L L. & POL. 121, 183–84 (2006) (commenting on arbitrations involving claims of economic force majeure, and noting narrow view of necessity defense taken by panel in the *CMS v. Argentina* dispute).

106. See Jorge San Pedro, *Kirchner’s Tough Talk Rattles Big Business*, EL PAIS (ENGLISH), Mar. 16, 2005, at 2, available at 2005 WLNR 4029858 (reporting President Kirchner’s announcement that “Argentina would not abide by the ICSID rulings and would only recognize the jurisdiction of local courts”).

what states originally contemplated or currently desire.¹⁰⁷ The emerging “international common law” relating to the handling of evidentiary and procedural questions among our proliferating international judiciary is also a resurgent form of customary international law.¹⁰⁸

The re-emergence of customary law in these contexts is in turn affecting the treaty obligations of the United States. Our government’s latest model bilateral investment treaty now takes a more nuanced position on such matters as the meaning of “fair and equitable treatment” and the scope of permissible treaty exceptions because of these developments.¹⁰⁹ And it is as yet unknown whether, for example, the customary law of permissible countermeasures, including traditional remedies canvassed in the rules of state responsibility such as reparations and the principle of proportionality,¹¹⁰ may yet play a role even with respect to the *lex specialis* remedial scheme contained

107. Signatories to the ICSID convention must enforce an ICSID judgment “as if it were a final judgment of a court in that State.” Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 54, Mar. 18, 1965, 4 I.L.M. 532; see also Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521, 1548 & n.102 (2005); Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 *VAND. J. TRANSNAT’L L.* 1313, 1320 (2003); Elihu Lauterpacht, *International Law and Private Foreign Investment*, 4 *IND. J. GLOBAL LEGAL STUD.* 259, 273 (1997). For non-ICSID arbitral awards, the New York Convention provides for equally reliable enforceability. See U.N. Convention on the Recognition and Enforcement of Arbitration Awards arts. 3, 5, June 10, 1958, 21 *U.S.T.* 2517, 330 *U.N.T.S.* 3.

108. See, e.g., JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 31 (2003) (recognizing value of advisory opinions for developing international common law); Bhala, *The Precedent Setters*, *supra* note 72 at 3–4 (“[W]e can observe the emergence of an international common law of procedure in WTO adjudication with respect to (1) burden of proof, (2) judicial economy, (3) standing, and (4) sufficiency of complaints.”).

109. See Office of the U.S. Trade Representative, 2004 U.S. Model Bilateral Investment Treaty (BIT), Annex A, arts. 5, 18, available at http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf (defining role of custom in interpreting minimum standard of treatment—including “fair and equitable treatment”—under BIT, and limiting non-precluded measures to those involving Party’s security interests and obligations); see also Gilbert Gagné & Fean-Frédéric Morin, *The Evolving American Policy on Investment Protection: Evidence from Recent FTAs and the 2004 Model BIT*, 9 *J. INT’L ECON. L.* 357 (2006) (analyzing changes in U.S. approach to bilateral and regional trade agreements in light of U.S. experience with NAFTA).

110. See Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex, arts. 31, 34–39, 49–54, U.N. Doc. A/RES/56/83/Annex (Dec. 12, 2001) [hereinafter Articles of State Responsibility] (reciting customary international law on reparations and countermeasures).

in the WTO's Dispute Settlement Understanding.¹¹¹

While it may be true that customary norms are generally consistent with U.S. national interests, to conclude from that banal point that the United States is therefore unconstrained by the product of investor-state and WTO dispute settlement insofar as it incorporates custom is a non sequitur. As is suggested by the huge efforts expended by the U.S. government to win NAFTA (and WTO) cases, the interpretations of customary and treaty law by such tribunals are of deep interest to us—because our federal and state laws or enforcement efforts could be undermined by the precedents established. That the United States has a national interest in, for example, having its investors be compensated for an expropriation, does not mean that NAFTA arbitrators will necessarily take the same view as a state of the United States about what an “indirect expropriation” means.

The revival of custom is occurring in more than the investment and trade regimes. As Ted Meron has recently pointed out, customary international law is undergoing a renaissance in part because all of our proliferating international dispute settlers face comparable needs to avoid a finding of *non liquet*—even when faced with questions over which no treaty rules apply or with respect to questions left open by vague or porous treaties.¹¹² They too regularly turn to general principles and custom. Thus, the Iran-U.S. Claims Tribunal revived and gave more specific content to a range of customary rules,¹¹³ such as those governing the wrongful expulsion of aliens.¹¹⁴

111. See, e.g., Decision by the Arbitrators, *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, ¶ 6.16, WT/DS27/ARB (Apr. 9, 1999) (relying on the “general international law principle of proportionality of countermeasures” in calculating nullification and impairment); Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 EUR. J. INT'L L. 483, 519–23 (2006) (exploring the extent to which customary rules on countermeasures and reparations may apply residually in the WTO regime).

112. See generally Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT'L L. 817, 818–20 (2005) (outlining expansive use of customary international law in lieu of and in addition to treaties, and—as demonstrated by the ICJ—the use of treaties as a basis for discerning principles of custom).

113. See CHARLES N. BROWER & JASON D. BRUESCHKE, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 631–56 (1998) (discussing the extent of Iran-United States Claims Tribunal's impact on customary international law).

114. Though the impact of the tribunal on customary law concerning wrongful expulsion of aliens was considerably less than expected. See *id.* at 631–57 (discussing tribunal's decisions on wrongful expulsion and pointing out that tribunal's inefficiency and State Parties' decision to settle outstanding claims left the tribunal deciding far fewer wrongful expul-

That Tribunal, which continues to operate today, along with other ad hoc bodies such as the UN Compensation Commission and the Eritrea-Ethiopia Claims Commission, have also applied and helped to refine the state responsibility rules recently issued by the ILC.¹¹⁵ Those rules, as well as customary human rights such as the ban on torture, continue to be emphasized in our regional human rights courts—as in the *Velasquez-Rodriguez* decision by the Inter-American Court of Human Rights¹¹⁶ and numerous decisions issued by the European Court of Human Rights.¹¹⁷

As Meron also points out, despite the strictures of *nullum crimen sine lege*, the ad hoc war crimes tribunals have also applied and developed customary rules about command responsibility, what constitutes participation in a “joint criminal enterprise,” and the requisites of the crime of complicity.¹¹⁸ As he indicates, those tribunals have developed customary law concerning “the nexus of such crimes to armed conflict, the distinction between the concepts of ‘attack’ and ‘armed conflict,’ the requirement of discriminatory intent, the elements of the crime, such as the existence of a plan or policy, the relevance of personal motives, and the actus reus of the crime of persecu-

sion cases than expected); see also Charles N. Brower, *The Lessons of the Iran-United States Claims Tribunal: How May They Be Applied in the Case of Iraq?*, 32 VA. J. INT'L L. 421, 427 (1992) (“Perhaps the greatest failure of the Iran-United States Tribunal was that[, in the nine years] prior to the lump sum settlement of most of these ‘wrongful expulsion’ cases by the two governments in 1990[,] . . . the Tribunal had adjudicated only six such cases and had awarded damages in only one.”).

115. Compare Articles of State Responsibility, *supra* note 110, with Partial Award, Civilian Claims—Eritrea’s Claims 15, 16, 23 & 27–32, 44 I.L.M. 601, 607–08 (Eri-Eth. Cl. Comm’n 2004) (noting importance of customary international humanitarian law for determining Ethiopia’s responsibility for its treatment of Eritrean nationals); BROWER & BRUESCHKE, *supra* note 113, at 442–71 (reviewing contribution of Iran-U.S. Claims Tribunal to customary law on state responsibility, causation and defenses in context of takings law); Gordon A. Christenson, *State Responsibility and the U.N. Compensation Commission: Compensating Victims of Crimes of State*, in THE UNITED NATIONS COMPENSATION COMMISSION 311 (Richard B. Lillich ed., 1995) (discussing law of state responsibility as it functioned in U.N. Compensation Commission).

116. *Velásquez Rodríguez Case*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, paras. 164–77 (July 29, 1988) (articulating obligation of due diligence incumbent upon states under customary international law).

117. See, e.g., *Ilaşcu v. Moldova*, 2004-VII Eur. Ct. H.R. 179, 262–64 (reciting principles of state responsibility applicable to case against Moldova and Russian Federation); *Asanidze v. Georgia*, 2004-II Eur. Ct. H.R. 221, 260–62 (applying customary international law to determine Georgia’s responsibility for actions of local Ajarian authorities within its territory); *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79, 93, 101 (discussing sources of international law that classify prohibition against torture as *jus cogens*).

118. Meron, *supra* note 112, at 821–34.

tion.”¹¹⁹ As Meron also indicates, with respect to the treaty-based crime of genocide, these tribunals have turned to, and in turn developed, the customary law with respect to genocidal intent, and the meaning of aiding and abetting or complicity.¹²⁰ The treaty-based category of war crimes has also been subject to considerable customary law elaboration—as with respect to the crimes of torture and rape or the defense of duress.¹²¹ Like other international adjudicators mentioned here that have had to resolve evidentiary and procedural disputes, the ad hoc war crimes tribunals have addressed (and developed) customary rules regarding the issuance of subpoenas to state officials, the examination of documents raising national security concerns, and arrest, abduction and international transfer.¹²² Most of this law is relatively precise and none of it can be disparaged as unenforceable.

Note that much of the customary international law revival has occurred in the shadow of, and been spurred on by, a considerable number of multilateral treaties across a range of topics, from the regulation of trade and investment to rules governing combatants.¹²³ Those who predicted that the proliferation of such treaties would bring about the demise of customary law overestimated the ability of treaty drafters to anticipate the needs of states—or of their dispute settlers.¹²⁴

119. *Id.* at 828 (citations omitted).

120. *Id.*

121. *Id.*

122. *Id.* at 828–29.

123. See, e.g., *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103 (June 27) (relying on Geneva Conventions as reflecting “fundamental general principles of humanitarian law”); *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 751 n.541 (Andreas Zimmermann et al. eds., 2006) (listing Permanent Court of International Justice and ICJ cases in which treaties have been used as evidence of state practice constituting customary international law); Juan C. Consuegra-Barquin, *Cuba’s Residential Property Ownership Dilemma: A Human Rights Issue Under International Law*, 46 RUTGERS L. REV. 873, 883 (1994) (referencing “over two hundred bilateral investment treaties” as “evidence of a trend in current state practice toward full compensation”). Cf. Gary L. Scott & Craig L. Carr, *Multilateral Treaties and the Formation of Customary International Law*, 25 DENV. J. INT’L L. & POL’Y 71, 78–94 (1996) (discussing scholarly views and their own theory on use of multilateral treaties to evidence custom). See generally Mark E. Villiger, *CUSTOMARY INTERNATIONAL LAW AND TREATIES* (2d ed. 1997) (surveying ways in which treaties and customary international law interact and influence one another).

124. As Mark Villiger observes:

[T]he last decades have witnessed an impressive number of conventions. In but a few instances, however, have these conventions commanded the numerous ratifications originally hoped for by the drafting bodies. The surprising

Now it is true that the United States has a greater ability to avoid the impact and to influence the formation of custom than most. Yet, the same state that helped to codify many of these customary rules through the Rome Statute of the ICC¹²⁵ and the Elements of Crimes document¹²⁶ did not necessarily anticipate just how these developments could, in the wake of later torture scandals, for example, come back to haunt it—indeed, could come back to bite some of the same officials and lawyers who participated in their drafting. Nor is the “bite” of custom explicable merely in terms of lack of foresight. Custom as a source of real world obligation, as well as its specific rules, is consistent with the interests of states. Since the United States has a clear interest in such matters as effective trade and investment dispute settlement, it, like all nations, has a strong interest in maintaining this inchoate source of obligation, as well as the reciprocal international law game that custom reflects.

To be sure, as the recently passed Military Commissions Act appears to suggest,¹²⁷ the United States has greater power than most

consequence has been that many States nevertheless regard themselves bound *qua* customary law by some, or even many, of the provisions of otherwise unratified instruments.

Villiger, *supra* note 123, at 3. See also Lynn Loschin, *The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework*, 2 U.C. DAVIS J. INT'L L. & POL'Y 147, 148–49 (1996) (positing that, “despite the proliferation of multilateral conventions,” the use of reservations and understandings by signatories, as well as the possibility of a state forgoing ratification entirely, means that “custom retains an important role in the creation of international human rights law”).

125. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90. Despite its current opposition to the ICC, the United States did play an active role in negotiating the Rome Statute. See, e.g., Patricia M. Wald, *An American View of International Criminal Law*, 30 OKLA. CITY U. L. REV. 821, 837 (2005).

126. Preparatory Comm'n for the Int'l Criminal Court, *Report of the Preparatory Commission for the International Criminal Court: Addendum, Part II, Finalized Draft Text of the Elements of Crimes*, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000). “[T]he Elements of Crime document, defining war crimes covered by the Rome Statute in greater detail than ever before, was in critical part the product of Pentagon drafters.” Wald, *supra* note 125, at 837.

127. In addition to rendering the Geneva Conventions non-self-executing for private litigants targeting U.S. officers, the Military Commissions Act also expressly outlaws using any “foreign or international source of law . . . [as] a basis for a rule of decision in the courts of the United States in interpreting the [U.S. statute punishing war crimes].” See MCA § 6(a)(2). Instead, the MCA prescribes that U.S. courts will apply the MCA’s domestic law definitions in determining whether a grave breach of Common Article 3 has occurred. See *id.* § 6(b)(1)(B). By divorcing the definitions of war crimes from their roots in customary international law, the U.S. approach risks backtracking on and perhaps abrogating fully the current levels of protection international law provides. W. Michael Reisman, *Editorial Comment: Holding the Center of the Law of Armed Conflict*, 100 AM. J. INT'L L. 852, 854–

to immunize its officials from the reach of some of these customary developments. But, as General Pinochet and others can attest to if asked, forms of national immunity are no longer the surefire guarantees that they once were—not in a global market of buyers and sellers of customary norms and a variety of forums in which to test them or to direct political pressure against those who try to elude them. International forum shopping is more alive than ever before.¹²⁸ The international law game is no longer played—if it ever was—exclusively within U.S. federal courts, and even when it is, there are fewer guarantees that our increasingly cosmopolitan judges, under pressure to speak with one voice with their international brethren, will ignore law from elsewhere or the “decent respect for the opinions of mankind.”¹²⁹

Contrary to the critiques of some who have suggested that consensual treaties invariably have greater real world significance and legitimacy, there is an undeniable power and appeal that attaches to rules that legitimately can be said to apply to all nations precisely because none of them want to admit to violating them. This is evident even with respect to fundamental questions of national security at the heart of sovereignty. Certainly those who wrote the infamous torture memos¹³⁰ for the Bush Administration underestimated the power of the customary prohibition on torture—which appears to apply even beyond the territorial and jurisdictional limitations that are

56, 860 (2006) (explaining how the United States may wear away the international law definition of torture by recognizing a necessity exception to the current absolute prohibition on the practice).

128. See generally Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285 (1999) (surveying practice of forum shopping amongst human rights tribunals, discussing policies implicated by the practice and suggesting possible reform of such forum shopping); Richard H. Kreindler, “*Arbitral Forum Shopping*”: *Some Observations on Recent Developments in International Commercial and Investment Arbitration*, 16 AM. REV. INT’L ARB. 157 (2005) (discussing problem of forum shopping in international arbitration of investment disputes).

129. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776); see also Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145, 1156 (2006) (“The Declaration of Independence instructs us to pay ‘decent respect to the opinions of mankind,’ a mandate, in effect, to respect international law.”); Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 49 (1994) (“I look forward to the day when the majority of the Supreme Court will inform almost all of its decisions almost all of the time with a decent respect to the opinions of mankind.”).

130. For a comprehensive reprinting of the torture memos, see generally THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Joshua L. Dratel & Karen J. Greenberg eds., 2005).

said to limit treaty instruments such as the Torture Convention.¹³¹ And the power of customary norms may also help to explain the views of those justices of our Supreme Court who, in *Hamdan*, chose to rely on Common Article 3 of the Geneva Conventions but suggested in their reasoning and interpretation a strong reliance on customary law, as well as its singular global appeal.¹³² The recently passed Military Commission Act, to the extent it is interpreted or used in a way that is inconsistent with such universally appealing norms, may yet prove an ineffectual reed against the growing internationalization of our (and other nations') laws—particularly as other nations react, including with respect to cooperating (or not) with our global war on terror.¹³³

The international law of today—both our treaty-based institutions and our emerging and ever more specific rules of custom—is not quite as constrained as is suggested by books like Goldsmith and Posner's *The Limits of International Law*.¹³⁴ As Paul Berman and Peter Spiro have pointed out, such rational choice critiques focus too narrowly on the alleged short-term self interest and actions of states.¹³⁵ International law today is not as state-centric as it once was

131. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 2(1), 16(1), Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (obligating each state party to take measures to prevent torture and cruel, inhuman, or degrading treatment "in any territory *under its jurisdiction*" (emphasis added)). *But see, e.g., id.* art. 3(1) ("No State Party shall expel, return [*refouler*] or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.").

132. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 633–35 (2006) (plurality opinion) (turning to customary international law, including that articulated in Article 75 of Protocol I of the Geneva Conventions, to interpret Common Article 3's mandate that detainees be afforded "all the judicial guarantees which are recognized as indispensable by civilized peoples").

133. *Cf., e.g., Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) 4, 44–45 (1989) (concluding, based in part on prison conditions for death row inmates in United States, that extradition of Soering to United States would breach Article 3 of European Convention on Human Rights); Daniel J. Sharfstein, *Human Rights Beyond the War on Terrorism: Extradition Defenses Based on Prison Conditions in the United States*, 42 SANTA CLARA L. REV. 1137, 1147–57 (2002) (analyzing extent to which European Convention on Human Rights may prevent European countries from extraditing individuals to United States based on U.S. prison conditions).

134. GOLDSMITH & POSNER, *supra* note 95; *see also supra* notes 96–98 (reciting views of revisionist scholars).

135. Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265, 1306 (2006) ("By refusing at the outset even to consider the ways international law might affect state decisionmaking short of outright coercion, Goldsmith and Posner ensure that no possible role for international law will be found beyond simply as a tool for state self interest."); Peter J. Spiro, *A Negative Proof of International Law*, 34 GA. J. INT'L &

and the actions of many others matter as well. Both the law-makers and the law-enforcers now include quasi-autonomous inter-governmental organizations, NGOs, multinational corporations (who are, for example, de facto complainants before the WTO¹³⁶ and actual private attorney-general enforcers of the investment rights¹³⁷), and even individuals (who can bring disputes before a number of human rights bodies¹³⁸ or can be criminal defendants¹³⁹).

All of this suggests that this is quite an odd time to suggest, as some do, that we ought to have a “unitary” executive with respect to foreign affairs.¹⁴⁰ Quite apart from whether such a development

COMP. L. 445, 447 (2006) (“NGOs and corporations are now independently consequential actors in the dynamic of international law, as an empirical matter, and so international law models must move to take account of them. Insofar as Goldsmith and Posner brush them aside, their analysis is at least incomplete.”).

136. See, e.g., Jeffrey L. Dunoff, *The Misguided Debate over NGO Participation at the WTO*, 1 J. INT’L ECON. L. 433, 434 (1998) (“While, as a formal matter, the WTO ‘legislative’ and dispute resolution systems are open only to state actors, in fact private parties already participate extensively in WTO processes[, though] this participation is indirect, unofficial and largely *ad hoc*.”).

137. See, e.g., Franck, *supra* note 107, at 1538 (reasoning that, when investment treaties that allow private suits directly against the sovereign in a neutral forum, they create a cause of action that “permits investors to act like ‘private attorney generals,’ and places the enforcement of public international law rights in the hands of private individuals and corporations”).

138. See, e.g., Optional Protocol to the International Covenant on Civil and Political Rights art. 1, *adopted* Dec. 16, 1966, 999 U.N.T.S. 302 (*entered into force* Mar. 23, 1976) (permitting Human Rights Committee “to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the [ICCPR].”); Convention for the Protection of Human Rights and Fundamental Freedoms art. 34, *opened for signature* Apr. 11, 1950, 213 U.N.T.S. 222 (empowering European Court of Human Rights to “receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation . . .” of the European Convention of Human Rights or its protocols).

139. See, e.g., Rome Statute of the International Criminal Court, *supra* note 125, art. 1 (granting the ICC jurisdiction “over persons for the most serious crimes of international concern . . .”); Statute of the International Tribunal for the Former Yugoslavia art. 1, *adopted* May 25, 1993, 32 I.L.M. 1192 (declaring ICTY’s competence to “prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia”).

140. See, e.g., Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001) (positing that the President has strong residual powers over foreign affairs, subject to narrow, express limits in Constitution); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996) (arguing from founding era sources such as contemporary state constitutions that founders intended war powers to be conducted by a strong unitary executive). *But see*, e.g., Joseph W. Dellapenna, *Presidential Authority and the War on Terror*, 13 ILSA J. INT’L & COMP. L. 25, 48 (2006) (disagreeing with theory of unitary executive and arguing instead that “[t]he President’s power to act unilaterally is strictly limited by the Con-

would be desirable or historically consistent with our Constitution—and personally I think it is neither—the truth is that such a development is not likely to last long. The aggrandizement of U.S. presidential power has occurred in substantial part because of the expanding domain of “foreign relations.” The executive’s ability to enter into treaties, engage with international organizations, and participate in the making of custom has expanded his power vis-à-vis Congress and the states of the United States. But, this enhancement of power has come with a price. At no time in its history has the executive, or the legislature or courts for that matter, been less “unitary” in the sense that any of them can afford to ignore legal developments at the international level or even by foreign courts and others around the world—developments no President, Democrat or Republican, can control. While some policy makers and academics yearn for an age when the U.S. President was free of the Gulliver-like constraints of international norms (or of the many non-state actors that deploy them), that time—that sovereignty¹⁴¹—is long since past. The United States’ own actions as a nation have helped to bring this about.

That U.S. law is increasingly internationalized helps to explain ever louder denunciations of the phenomenon. The facts are that an increased number of law schools, most recently that bastion of curricular innovation, Harvard Law School, are now requiring international law as a course, that this course is now re-emerging even in undergraduate curriculums, that even our main journals carry articles on international law and that the leaders of the bar devote ever more resources to it—all of these prompt a predictable backlash.

I used to talk about the ‘four horsemen of the constitutional apocalypse’—referring to Jack Goldsmith, Curtis Bradley, John Yoo and Ernest Young and their constitutionally grounded critiques of in-

stitution and by valid treaties and acts of Congress.”); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1729 (1996) (reexamining historical bases of unitary executive theory and finding it “incomplete and flawed”); Cass R. Sunstein, *The Myth of the Unitary Executive*, 7 ADMIN. L.J. AM. U. 299, 300 (1993) (asserting that the theory of the executive being exclusively in charge of administrative state “is not an accurate interpretation of the Constitution” but rather “a fabrication by people of good intentions who have spoken ahistorically”).

141. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* 26–28 (1995) (“Traditionally, sovereignty has signified the complete autonomy of the state to act as it chooses, without legal limitation by any superior entity If sovereignty in such terms ever existed outside books on international law and international relations, however, it no longer has any real world meaning.”).

ternational law.¹⁴² Today, I no longer use that term since the original four have metastasized into a horde. But the fact that so many talented lawyers—who once would have devoted their lives to undermining labor law or the law of antitrust—now devote themselves to trashing our subject fills me with joy. The fact that our best and brightest now think it is worth both praising and attacking international law is a sign that international lawyers have *arrived*. And, as scholars of path dependency have suggested, when you arrive at some destinations, despite the occasional missteps, it is hard to go back.

142. See José E. Alvarez, *The Closing of the American Mind*, in CANADIAN COUNCIL ON INT'L LAW, RECONCILING LAW, JUSTICE AND POLITICS IN THE INTERNATIONAL ARENA: PROCEEDINGS OF THE 32ND ANNUAL CONFERENCE OF THE CANADIAN COUNCIL ON INTERNATIONAL LAW, OTTAWA, OCT. 16–18, 2003, at 74, 87–88 (2003).