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August 8, 2012

Freedom from Fear: International Law as a Constructive Force for Supporting American Foreign Policy

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Freedom from Fear: International Law as a Constructive Force for Supporting American Foreign Policy

by

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Pages: 54; Words: 17,885

Introduction

Today there is considerable debate about the role and status of international law within the legal and political culture of the United States.[3] The notion of U.S. compliance with international law has in a general sense generated detractors in both the U.S. Congress as well as in professional organizations such as the Federalist Society.[4] Indeed, during the previous administration of George W. Bush there was a lively internal debate about the precise value and role of international law as either a force for enhancing or diminishing vital national security interests as some understood them within that administration.[5] Jack Goldsmith, in a 2003 memo for the Department of Defense, for example, stated:

> In the past quarter century, various nations, NGOs, academics, international organizations, and others in the 'international community' have been busily weaving a web of international laws and judicial institutions that today threatens [U.S. government] interests.[6]

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[3] *See, e.g.,* JACK L. GOLDSMITH AND ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005) (arguing that international law is really just politics, and that states follow it only when it suits their needs).

[4] *See* The Federalist Society, Our Background, *available at* http://www.fed-soc.org/aboutus/id.28/default.asp. For information on the development of the Federalist Society, *See* John O. McGinnis, *An opinionated history of the Federalist Society.* 7 Geo. J.L. & Pub. Pol'y 403-413 (2009); In fact though, Harold Koh, among others, has pointed out that the U.S. does not generally refuse to comply with international law, but rather refuses to ratify international treaties and make them explicitly binding. Koh refers to this as "American compliance without ratification." Harold Hongju Koh, *On American Exceptionalism,* 55 Stan. L. Rev. 1479, 1484 (2002).

[5] *See* Jack Goldsmith, "Judicialization of International Politics" Memo of the General Counsel of the Department of Defense, April 1, 2003, *available at* http://library.rumsfeld.com/doclib/sp/221/2003-04-09%20to%20Vice%20President%20et%20al%20re%20Judicialization%20of%20International%20Politics.pdf; *See also* John R. Cook, *Contemporary Practice Of The United States Relating To International Law: General International And U.S. Foreign Relations Law: Senior Administration Officials Voice Varying Perspectives On International Law,* 101 AM. J. INT'L L. 195 (2007).

[6] Jack Goldsmith, *supra* note 5.

This article considers the extent to which international law might be seen as a constraint or a force that might undermine vital national interests of the United States. It is our contention that in general international law may be understood and construed as a facilitator, supporter, and possible clarifier of the objectives and execution of U.S. foreign relations interests. We conclude that modern international law is harmonious with and indeed a direct reflection of American values, and that active engagement and participation in the development and strengthening of international law and its institutions will make the United States more secure. Adhering to a stricter compliance with international law will make America's foreign policy more consistent and facilitate the achievement of national security objectives.

It might be useful to begin with an admission: the boundaries of international law are contested.[7] Thus the answer to the question of whether U.S. national interests are or are not consistent with international law is at times in flux or ambiguous. First, one might better respond to this analytical challenge if it were approached rigorously with contemporary tools and methods of inquiry and exposition. We have elsewhere discussed at length the application of Modern Communications

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[7] The diplomat and legal scholar Philip C. Jessup described international law as the

> law applicable to states in their mutual relations and to individuals in their relations with states. International law may also, under this hypothesis, be applicable to certain interrelationships of individuals themselves, where such interrelationships involve matters of international concern.

PHILIP C. JESSUP, A MODERN LAW OF NATIONS 17 (Macmillan 1948); *but see* GOLDSMITH AND POSNER, *supra* note 3 arguing that international law is essentially just politics; Rosalyn Higgins, *infra* note 12, describing international law as a process of authoritative decision making.

Theory to the analysis of international law.[8] Here, it is sufficient to point out that the tools used to discern the composition of international law is far advanced from John Austin's classical and anachronistic formulation that international law is simply "What sovereigns say it is."[9] Second, U.S. national interests are not necessarily unchanging, and the U.S. relationship to international law may need to change accordingly. Indeed, U.S. policy makers have been quick to embrace international law when it is more obviously in harmony with U.S. political and military interests, such as when the United States (through the Security Council) invoked the emerging international law concept of the Responsibility to Protect to justify intervening in Libya in 2011.[10] The official position in relation to various international treaties has also changed as political conditions have made U.S. ratification of the conventions more clearly in line with U.S. security interest, such as with the United Nations Convention on the Law

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[8] *See* Winston P. Nagan and Joshua L. Root, *The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the UN Charter, and the Application of Modern Communications Theory,* (N.C. Journal of International Law, forthcoming, fall 2012; also in the authors' possession); *See also,* W. Michael Reisman, *"International Law-making: A Process of Communication,"* (1981), *Faculty Scholarship Series*, Paper 713, *available at* http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1719&context=fss_papers; McDougal and Reisman, The Prescribing Function in World Constitutive Process: How International Law is Made, 6 Yale J. World Pub. Ord. 249 (1980).

[9] *See* John Austin, "*The Province of Jurisprudence Determined*", W. Rumble (ed.), Cambridge: Cambridge University Press) (first published, 1832).--- (1879), *Lectures on Jurisprudence*, or *The Philosophy of Positive Law*, two vols., R. Campbell (ed.), 4th edition, rev., London: John Murray [Bristol: Thoemmes Press reprint, 2002], Lecture I, p. 36.

[10] *See* Irwin Cotler and Jared Genser, *Libya and the Responsibility to Protect*, N.Y. TIMES, Feb. 28, 2011; U.N. Security Council, *Security Council resolution 1973 (2011) [on the situation in the Libyan Arab Jamahiriya]*, 17 March 2011, S/RES/1973(2011) (referring to the Responsibility to Protect).

of the Sea.[11] Thus, the question of reconciling the values of international law with the values implicating the national interests of the United States is fluid and often punctuated by long periods of indeterminacy.

In addition to conceding initially that the scope and content of U.S. foreign relations does not reflect static dogma, it must be noted that international law is itself not encased in a frozen doctrine. (Rosalyn Higgins has described international law not as a hard corpus of rules, but as a continuing *process* for making authoritative decisions).[12] Indeed, there are many areas of international law in which its precise scope and character are heartily contested matters.[13] It is therefore possible that the specific prescription, application and enforcement of international law may represent challenges to the

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[11] The U.S. government's position was previously opposed to the Convention, largely due to Article X dealing with deep-sea mining, and the Convention's terms limiting reservations being logged by ratifying states. UN General Assembly, *Third United Nations Conference on the Law of the Sea.*, 14 December 1983, A/RES/38/59. Perceived benefits of the convention have recently overtaken concerns with Article X, however, particularly in light of a growing Chinese Navy. The Obama administration has taken an unusual vociferous stance in urging the Senate to ratify the Vienna Convention on the Law of the Sea. *See* Donna Cassata "Military Leaders, Clinton Push for Sea Treaty", Associated Press, May 23rd, 2012, *available at* http://bigstory.ap.org/content/military-leaders-clinton-push-sea-treaty.

[12] ROSALYN HIGGINS, PROBLEMS AND PROCESSES: INTERNATIONAL LAW AND HOW WE USE IT, 3 (OXFORD U. PRESS, 1994) further describing international law as

> a continuing process of authoritative decisions. This view rejects the notion of law merely as the impartial application of rules. International law is the entire decision-making process, and not just the reference to the trend of past decisions which are termed 'rules'.

[13] One example of the contested character of international law can be demonstrated by the often conflicting relationship between fundamental norms of human rights law and sovereign immunity of states from the domestic courts of other states. *See generally,* Nagan and Root, *supra* note 8.

standard methods of decision making and the theorizing about international law, such as in the legalistic or functionalistic approaches.[14] These approaches are context sensitive, and in the process of authoritative and controlling decision making, employ a wide range of tools for both the epistemology of international law and its concrete expression.

In this article we shall provide a broad historic sketch of the development of the foreign relations of the United States and its general relationship to foreign and international law.[15] We shall focus on three factors that have significantly influenced American perspectives on the inter-play between foreign policy and international law. These are the enduring legacy of isolationism, the tradition of U.S. exceptionalism, and a misplaced fear and skepticism of international law in general. We shall also draw attention to the distinctive contribution made in the legal profession to the development of American law and the role of international law within it (what could be called the contributions of the American professional legal culture and legal ideology), and its influence in the U.N. Charter system. This article does not focus on the virtues of international law as it relates to American foreign policy, as such; rather, it discusses common misconceptions about the incompatibility of international law and American values, and offers several factors that may account for the belief that

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[14] *See generally* Myres S. McDougal, *Law and Power,* 46 Am. J. Int'l L. 102 (1952) (discussing the legalistic approach to international law and foreign relations).

[15] For a more detailed analysis of the interplay between American foreign relations and international law, *see generally,* CARL Q. CHRISTOL, INTERNATIONAL LAW AND U.S. FOREIGN POLICY (2004); for a look at the relationship between international law and American foreign policy in the first half of the Cold War *see generally* Eugene V. Rostow, *American Foreign Policy and International Law*, 17 La. L. Rev. 552 (1956-1957).

international law undermines the foreign policy and national security of the United States.

The historic strains of isolationism and exceptionalism influence the state of the discourse about foreign relations and international law professionally and in government. In historical context there are factors which have been vested with strong ideological currency. These are predispositions which support a form of American isolationism in the international environment. This idea has overlap with another idea, that the American experience is an exceptional one, qualitatively different than the experience of any other nation, and that American exceptionalism might be undermined were the republic to be engaged politically with nations abroad (the historic view) or that international law undermines our democratic system (the modern concern).[16] The conventional take on U.S. exceptionalism is rooted in the idea that America was the first modern revolutionary state emphatically committed to the principles of

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[16] The term "American Exceptionalism" was supposedly coined by Alexis de Tocqueville in 1831, and is generally used as a shorthand way of expressing the notion that the United States differs in fundamental ways from other nations in its cultural, political, religious, and educational characteristics. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA II 36-37 (Phillips Bradley ed., Henry Reeve trans., A.A. Knopf 1948); Harold Koh has noted that American exceptionalism is quite "multifaceted", and has both positive and negative aspects, and that the terms "has been used far too loosely and without meaningful nuance." Harold Koh, *Supra* note 4, at 1480-1482; *See also*, MARGARET MACMILLAN, PARIS 1919: SIX MONTHS THAT CHANGED THE WORLD, 22 noting that:

> American exceptionalism has always had two sides: the one eager to set the world to rights, the other ready to turn its back with contempt if its message should be ignored. . . . Faith in their own exceptionalism has sometimes led to a certain obtuseness on the part of Americans, a tendency to preach at other nations rather than listen to them, a tendency as well to assume that American motives are pure where those of others are not. . . .

quoted in Koh, *Id.* at 1480.

liberty and democracy.[17] Implicit in these ideas is an argument about the nature of political and legal authority. This means that when the United States was founded by revolutionary forces committed to freedom and democracy it established a state completely distinctive to the global political reality at the time.[18] The endurance of this idea is reflected in the conservative views of organizations like the Federalist Society and others skeptics of international law who see it as representing a "democracy deficit" because "it is not subject to any kind of electoral accountability."[19] (This is a contention that betrays a fundamental misunderstanding of how international law is formed and how it works.[20]) Thus, there is a tension between the strength of American exceptionalism and the

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[17] Strains of American exceptionalism were evident very early on in the European colonization of the New World. Perhaps this had to do with the long, dangerous voyage across the Atlantic ocean and America's fervent protestant roots. Consider John Winthrop's famous speech stating: "We will be as a city upon a hill. The eyes of all people are upon us, so that if we deal falsely with our God in this work we have undertaken and so cause Him to withdraw His present help from us, we shall be made a story and a byword throughout the world." John Winthrop 1630, *available at* http://history.hanover.edu/courses/excerpts/111winth2.html.

[18] *See generally* TOCQUEVILLE, *supra* note 16.

[19] *See* John O. McGinnis and Ilya Somin, *Should International Law be Part of Our Law?* 59 Stan. L. Rev. 1175, 1175-1247 (2007).

[20] Generally, states are only bound by the international laws they agree (implicitly or explicitly) to be bound by. States are generally bound by the treaties they voluntarily enter into and by Customary international law, which is evidenced by state practice, supported by *opinio juris*. States can always enact domestic legislation in contradiction to customary international law (except *jus cogens* norms) avoid a customary international law rule that is developing from binding the state in question by persistent objection, or by enacting a treaty. *See* William S. Dodge, *Withdrawing from Customary International Law: Some Lessons from History*, 120 YALE L.J. ONLINE 169 (2010), *available at* http://yalelawjournal.org/2010/12/17/dodge.html (noting "it is well established that Congress may, as a matter of domestic law, override rules of customary international law.").

ostensible democracy deficit of foreign experience, including the development of foreign and international law.

In this view international law is generated from sources lacking the strong and vibrant distinctiveness of American democracy, and "rests on a fundamentally antidemocratic conception."[21] Such a view tends to prefer the primacy of national law and national interests over the interests implicated in the larger global community and represented in legal culture by international legal order. In this sense the older predilection for isolationism finds a justification in American exceptionalism. This in turn provides a perspective that is skeptical of international and foreign law, and international law institutions.[22] In particular, this school of thought is particularly hostile to the view that international and foreign law should influence the interpretation of American law or the American Constitution.[23] But lost here is the recognition that international law is often a reflection and extension of core American values. Unrecognized is the ability of international law to strengthen and preserve the vitality and relevance of the American Constitution, as well as America's

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[21] Jed Rubenfeld, *Unilateralism and Constitutionalism,* 79 N.Y.U.L. Rev. 1971, 2006 (2004).

[22] *See generally,* NATSU TAYLOR SAITO, MEETING THE ENEMY: AMERICAN EXCEPTIONALISM AND INTERNATIONAL LAW (NYU Press, 2010).

[23] *See* Stanford v. Kentucky 492 U.S. 361, 369 n.1 (1989) (J. Scalia) (stating that when interpreting the meaning of fundamental rights under the constitution's Bill of Rights, "We emphasize that it is *American* conceptions of decency that are dispositive. . . .") (emphasis added); *but see,* The Hon. William H. Rehnquist, Constitutional Court-Comparative Remarks (1989), *reprinted in* GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTUERE A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993) (where the conservative Rehnquist stated "now that constitutional law is solidly grounded in so many [foreign] countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.").

national security prerogatives, far more so than does it represent a threat to, or encumbrance upon, American national security or values.

The Relevant Historical Background

Most historians claim that the roots of isolationism were established during pre-revolutionary colonial times.[24] Colonists were to a large extent escaping from various forms of intolerance and persecution. Thus, settling in a new homeland they felt secure in their remoteness from the political stage that made them victims. Among the leading voices promoting the values of isolationism was Thomas Paine's, particularly in, *Common Sense*.[25] Paine's contribution had great influence on his contemporaries and its general orientation was that the national interest of the United States was better served by avoiding foreign alliances and entanglements.[26] This view was well expressed in the farewell address of President George Washington. According to Washington:

> The great rule of conduct for us, in regard to foreign nations, is in extending our commercial relations, to have with them as little political connection as possible. Europe has a set of primary interests, which to us have none, or a very remote relation. Hence she must be engaged in frequent controversies the causes of which are essentially foreign to our concerns. Hence, therefore, it must be unwise in us to implicate ourselves, by artificial ties, in the ordinary vicissitudes of her politics, or the ordinary combinations and collisions of her friendships or enmities.[27]

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[24] *See generally* Marie-Jeanne Rossignol, *Early Isolationism Revisited: Neutrality and Beyond in the 1790s.* 2 Journal of American Studies, 29, 215-227.

[25] *See* THOMAS PAINE, COMMON SENSE (1776) (Isaac Kramnick, ed., 1982).

[26] *See Id.* (stating "As Europe is our market for trade, we ought to form no partial connection with any part of it. It is the true interest of America to steer clear of European contentions . . . .").

[27] George Washington's Farewell Address 1796, *available at* http://avalon.law.yale.edu/18th_century/washing.asp.

The above quotation does not represent a view that isolationism means ignorance of the conditions in the larger world community which might influence the security and well being of the United States. In fact, it has been noted that, the "isolationism" attributed to Washington's speech and to early American policy is a misnomer, and that "The United States in its early decades was not isolationist. It was unilateralist."[28] Washington's remarks were a statement of prudence and caution about an international environment largely unsympathetic to the American Revolution and the young nation's commitment to the ideologies of freedom and democracy. In this sense isolationism could of course be seen as a "fear" of foreign threats and alignments or it could be seen as a strong caution in the U.S. approach to the challenges of the international environment, which was unsympathetic to the American republican form of government. Washington distinguished international commercial relations from international political connections, and fully endorsed the former.[29] Since doing international business necessarily implicates national interest, Washington's divorce of business from politics was probably unrealistic.

Washington's address may have been influential in the general formulation and exercise of U.S. foreign policy interests through the political branches of government and executive authority. The U.S. national experience, within the judiciary during the 18th and 19th centuries, however, appears to be more cosmopolitan, and the early jurisprudence of the Supreme Court cannot be accused of being either isolationist or driven

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[28] *See* Rubenfeld, *surpa* note 21, at 1978.

[29] In Washington's farewell address, he also stated, for example: "liberal intercourse with all nations, are recommended by policy, humanity, and interest . . . ." Washington's Farewell Address 1796, *supra* note 27.

by the impulse to exceptionalism.[30] In fact, the Founders and Framers of the Constitution certainly envisioned an expansive role in the judiciary for the application of international law to its jurisprudence.

A contemporary concern has been whether international law constrains the power of the President, and by implication, whether the judiciary has the power to scrutinize executive and legislative actions as they relate to possible violations of international law.[31] The key interpretative question is whether the phrase in Article III of the Constitution providing that "The judicial Power shall extend to *all* Cases . . . arising under . . . the Laws of the United States" is sufficiently broad to include the law of nations (international law).[32] Bush administration lawyers suggested that the President as "the sovereign" was empowered to ignore international laws "at his discretion," suggesting that those obligations are not really part of the laws of the United States at all.[33] The Founders and Framers of the Constitution, however, had a more expansive understanding of the laws of the United States.[34] In 1793, the

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[30] *See infra* pp. 15-19, discussing some of the many cases where American courts embraced international law as a component of American jurisprudence. One should also note the continued influence of the British common law on American courts following independence.

[31] *See generally* John C. Yoo and Robert J. Delahunty, *Executive Power v. International Law*, 30 Harv. J.L. & Pub. Pol'y 73 (2007); *See also,* GOLDSMITH AND POSNER, *supra* note 3.

[32] U.S. CONST. art. III, §2, cl. 1 (emphasis added); International law and Law of Nations are used interchangeably in Black's Law Dictionary. It is also referred to as *jus gentium*. Black's Law Dictionary 835, 903 (8th ed. 2004).

[33] John C. Yoo, *Memorandum for William J. Haynes II, General Counsel for the Department of Defense*, March 14, 2003, *available at* http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf.

[34] In 1793, Peter Duponceau, the defense lawyer in *Henfield's Case*, expressed the understanding of the founding generation that:

first Chief Justice of the Supreme Court, John Jay, explained emphatically: "as to the laws of nations – they are those laws by which nations are bound to regulate their conduct towards each other, both in peace and war . . . and the laws of nations . . . form a very important part of the laws of our nation."[35] Alexander Hamilton articulated his understanding that the law of nations was binding on the United States and its people, as well.[36] American judicial opinions from the founding of the

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> The law of nations . . . may be said, indeed, to be a part of the law of every civilized nation; but it stands on other and higher grounds than municipal customs, statutes, edicts, or ordinances. It is binding on every people and on every government. It is to be carried into effect at all times under the penalty of being thrown out of the pale of civilization, or involving the country into a war. Every branch of the national administration, each within its district and its particular jurisdiction, is bound to administer it. It defines offences and affixes punishments, and acts everywhere *proprio rigore*, whenever it is not altered or modified by particular national statues, or usages not inconsistent with its great and fundamental principles. Whether there is or not a national common law in other respects this universal common law can never cease to be the rule of executive and judicial proceedings until mankind shall return to the savage state.

Henfield's Case, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6, 360) (quoted *in* Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations,* 14 U.C. DAVIS J. INT'L L. & POL'Y 205, 212 (2008)). In 1792, U.S. Attorney General Edmund Randolph stated "The law of nations, although not especially adopted by the [C]onstitution is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation . . . ." 1 Op. Att'y Gen. 26, 27 (1792).

[35] Hefield's case, *supra* note 34, at 1102-04. In The Federalist Papers, John Jay had also noted that, "It is of high importance to the peace of America that she observe the laws of nations towards all these powers." THE FEDERALIST NO. 3 (John Jay) (Terrence Ball ed., 2003).

[36] *See, e.g.* Alexander Hamilton, Second Letter from Phocion to the Considerate Citizens of New York (Apr. 1784), *in* 3 THE PAPERS OF ALEXANDER HAMILTON 530, 550 (Harold C. Syrett ed., 1961) (writing that "we have taken our station among nations [,] have claimed the benefits of the laws which regulate them, and must in our turn be bound by the same laws.").

Republic repeatedly affirmed that the United States is bound by the law of nations and that international law is part of the laws of the United States.[37]

In 1800 Justice Chase noted, for example, that wars "extent and operations [are] . . . restricted by the ius belli [law of war] forming part of the law of nations."[38] The following year, Chief Justice Marshall stated that when the United States is at war "The laws of war, so far as they apply to our situation must be noticed."[39] The role of the courts in clarifying and applying

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[37] *See e.g.,* Rutgers v. Waddington, N.Y. Mayor's Court 1784, *reprinted in* SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY, 1674-1784, at 302, 308, 325 (Richard B. Morris, ed., 1935) (stating that the United States "[M]ust be governed by one common law of nations . . . [and] repeal of the law of nations, or any interference with it, could not have been in contemplation . . . when the Legislature passed this [state] statute; and we think ourselves bound to exempt that law from its operation . . . ."); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (where Justice Wilson wrote that "the United States were . . . bound to receive the law of nations, in its modern state of purity and refinement."); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793) (Jay, C.J.) (where the Chief Justice stated that following independence, the United States "had become a nation – [and] as such, we were responsible to others for the observance of the Laws of Nations.") (*reprinted in* N.H. GAZETTE (Portsmouth, N.H. 1790); Henfield's Case, 11 F. Cas. 1099 (C.C.D. Pa 1793) (No. 6360); *See also,* WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 136-38, 160 (Herbert A. Johnson ed., 1995). It has also been noted that even if the Article III clause on the "laws of the United States" was not originally understood to encompass the law of nations, "near consensus has emerged in the lower federal courts that customary international law is 'part of the federal common law.'" Gwynne Skinner, *When Customary International Law Violations Arise Under the Laws of the United States,* 36 Brooklyn J. Int'l L. 205, 208 (2010); *but see* Curtis A. Bradley and Jack Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position,* 110 Harv. L. Rev. 815 (1997) (arguing that law of nations is not properly a part of federal common law).

[38] Bas v. Tingy, 4 U.S. (4 Dall) 37, 43 (1800) (Chase, J.) (reasoning that "[i]f a general war is declared [by Congress], its extent and operations are only restricted and regulated by the jus belli, forming a part of the law of nations . . . .").

[39] Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28, 43-44 (1801) (Chief Justice Marshall also stated that he "common principles and usages of nations," are "principles which we believe, and which it is our duty

international law, in particular the scope of international law in light of an act of Congress, was clarified in 1804 in the often cited *Charming Betsy* case where the Marshall court held that an act of Congress must be construed consistently with international law if at all possible.[40] In the 1814 case *Brown v. the United States*, Justice Story maintained that the laws of war (a component of the law of nations) limited the powers of the presidency and were fully binding during war.[41] According to Story,

> (B)y what rule . . . must [the President] be governed? . . . By the law of nations as applied to a state of war . . . He has a discretion vested in him, as to the manner and extent; but he cannot lawfully transcend the rules of warfare . . . . He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims.[42]

In 1870 Justice Field reiterated the basic constitutional expectation that "The power to prosecute war . . . is a power to

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to believe, the legislature of the United States will always hold sacred.") *Id.*

[40] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 2LED 208 (1804); *See also,* Jordan J. Paust, *Customary International Law and Human Rights Treaties* Are *Law of the United States,* 20 Mich. J. Int'l L. 301, 331-32 (1999); *In Their Own Words, supra* note 34, 222 (noting that although Chief Justice Marshall

> did not indicate what might follow in every case where an act is unavoidably in conflict, he emphasized that 'consequently, [an act of Congress] *can never* be construed to *violate* . . . *rights* . . . [under the customary law of nations] further than is warranted by the law of nations.' Thus, the Chief Justice affirmed, *rights* under the customary law of nations must prevail unless a deprivation is 'warranted by the law of nations.' Seemingly ideologically motivated writers often attempt to ignore the latter portion of Chief Justice Marshall's important affirmation of the unavoidable primacy of rights under customary international law when they address *The Charming Betsy*.

(internal citations removed), 222.

[41] Brown v. United States, 12 U.S. (8 Cranch) 49, 153 (1814).

[42] *Id.*

prosecute war according to the law of nations, and not in violation of that law."[43]

Moreover, lower courts applied the rules of humanitarian law during the Civil War.[44] Thus, the library books of the University of North Carolina which were confiscated as a prize of war, were ordered by the federal courts to be returned to the university. The United States, the court concluded, was "not at war with literature", and the books were outside the authority of the military to seize.[45] (It should also be noted that the first modern codification of the laws governing warfare were promulgated under the direction of President Lincoln for use by the Union Army during the Civil War, and derived largely from international custom.[46] In turn, this codification influenced the progressive development of the laws of war internationally.[47]

From the perspective of the practitioner, the opinion of Attorney General Speed in 1865 is pertinent. According to the Attorney General:

> That the law of nations constitutes a part of the laws of the land must be admitted. . . . From the very face of the Constitution . . . it is evident that the laws of nations do constitute a part of the laws of the land. . . . The

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[43] Miller v. United States, 78 US (11 Wall.) 268, 314-16 (1870).

[44] *See, e.g.,* New Orleans v. The Steamship Co., 87 U.S. (20 Wall.) 387 (1874); *See also,* Brian Farrell, *Application of international Humanitarian Law by United States Courts,* 28 Penn St. Int'l L. Rev. 177; STEPHEN C. NEFF, JUSTICE IN BLUE AND GREY: A LEGAL HISTORY OF THE CIVIL WAR (Harvard University Press 2010).

[45] *See* The Amelia, 1 F. Cas. 595; 4 Phila. 417 (1861).

[46] *See* STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS: A GENERAL HISTORY 186 (Cambridge 2005); *but see* Neff *Id.* at 23 noting that the Code of Manu, which contained rules for restraint in warfare, was developed in India over the course of the first millennium AD, suggesting that the codification of the laws of war is not really such a new phenomenon after all. *See also* Instructions for the Government of Armies of the United States in the Field (Lieber Code). 24 April 1863 *available at* http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument.

[47] *Id.*

> laws of war constitute a much greater part of the law of nations. Like other laws of nations they exist and are a binding force upon the departments and citizens of the government, though not defined by any law of Congress . . . (War) must be under the Constitution carried on according to the known laws and usages of war among civilized nations. Congress cannot abrogate them or authorize their infraction. The Constitution does not permit this government to prosecute a war as an uncivilized and barbarous people.[48]

An important insight from the Supreme Court during the Civil War is found in the case *Ex parte Milligan*.[49] There the court suggested that the President had no powers *ex necessitate*.[50] His authority "is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make [nor violate] the laws . . . ."[51] The Court added that "By the protection of the law human rights are secured; withdraw that protection and they are at the mercy of wicked rulers. . . ."[52]

Courts in the 20th century again reiterated that international law is part of the laws of the United States. This was done most famously in 1901, in the *Paquete Habana* case, where the Supreme Court stressed that military executive powers during a war related to the occupation of foreign territory was "regulated and limited . . . directly by the laws of war . . . the law of nations."[53] Even after the development of the Erie Doctrine, international law clearly remained part of the laws of

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[48] 11 Op. Att'y Gen. 297, 299-300 (1865).

[49] Ex parte Milligan, 71 US (4 Wall.) 2, 119-21 (1866).

[50] *See Id.* at 127.

[51] *Id.* at 121.

[52] *Id.* at 119.

[53] The Paquete Habana, 175 U.S. 677, 700, 20 S.Ct. 290 (1900).

the United States, as an enduring enclave of federal common law.[54]

In light of the strong currents of isolationism and exceptionalism, the important question is what factors influenced the jurisprudence of the American courts to effectively embrace international law as a normal component of the judicial tasks assigned to it under the Constitution? A possible answer may be found in the foundations and legacy of *Marbury v. Madison*.[55] Justice Marshall, the case's author, had an enormous influence on the direction the Supreme Court would take, by his learned decisions in the Court's pivotal formative years. Before becoming a Justice of the Supreme Court, John Marshall who served as Secretary of State (and in the House of Representatives) was familiar with foreign relations issues, and had an appreciation of the importance of law as an aspect of the effective discharge of foreign relations obligations.[56] In *Marbury v. Madison* he was careful to point out that under the Constitution some matters are within the exclusive competence of the Executive Branch.[57] Yet Marshall also articulated an appropriate role for the courts in foreign relations law.[58] One

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[54] *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (ruling that the Act of State doctrine is part of the federal common law).

[55] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[56] *See generally,* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION, (Holt) (1998).

[57] Marbury 5 U.S. (1 Cranch) 137.

[58] *Id.* As a member of the House of Representatives, John Marshall noted in 1799, that the people of the United States did not have competency to partake in acts such as piracy in contravention of the laws of nations, because Congress had no power to violate the law of nations. In other words, "[the nation was bound" by the law of nations "in like manner, as the nation is now bound" by treaties and "[t]he duty was the same, and devolved on the executive" as well as the Congress and the courts. Rep. John Marshall, Speech of Mar. 4, 1799, 10 ANNALS OF

plausible reading of *Marbury* is that the power of judicial review is found in a residual principle of interpretative *reasonableness*, best analyzed with the impartial judgment of a trained judiciary.

This idea of reasonableness has a general pedigree in the tradition of natural law.[59] But a very strong expression of this is found in the Roman-Dutch legal tradition. The leader of the Dutch school was Hugo De Groot (Grotius).[60] Grotius is famous on the continent for his synthesis of Dutch/Germanic and Roman law into a holistic system which was tied together by the natural law principles of reason and reasonableness. It was these ideas that he applied to the leading international law text of his time, *The Law of War and Peace*.[61] It is likely that these sources which endorsed reasonable construction and interpretation, as sparse as they were, may have influenced the *Marbury v. Madison* case and would certainly have influenced the receptiveness of the Supreme Court to international law. Additionally, Blackstone, whose work was widely known to American

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CONG. 607 (1800) (*quoted in* Paust, *In Their Own Words, supra* note 34, at 212-13).

[59] *See generally,* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (Oxford: Clarendon Press, 1980).

[60] Hugo de Groot, more popularly known as Grotius, is regarded as the father of modern international law. The landmark work for which he is justly honored is De Jure Belli ac Pacis. HUGO GROTIUS, ON THE LAW OF WAR AND PEACE: STUDENT EDITION, (Stephen C. Neff, ed. 2012); HUGO DE GROOT, DE JURE BELLI AC PACIS [The Law of War and Peace] (Francis W. Kelsey trans., Oxford Univ. Press 1925) (1625). In the context of emerging conceptions of self-determined sovereignty, Grotius sought to develop a coherent conception of an international community subject to the rules of reason and law. The Grotian tradition is commonly seen as providing a compelling juridical basis for the idea of a comprehensive legal obligation predicated upon a rule of law and founded on principles of reason, rationality, and moral ordering. *See also* Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 Brit. Y.B. Int'l L. 1, 18-21 (1946).

[61] GROTIUS, *supra* note 60.

practitioners, had himself indicated that "The rule which natural reason has dictated to all men is called the law of nations."[62]

It may be confidently asserted that the place of international law in U.S. political and legal culture in the 18th, 19th, and early 20th centuries was sustained by the strength of its professional articulation in the courts and the development of a strong scholarly tradition which influenced the practice of law.[63] The legal ideology and jurisprudence implicated in the idea of reason as discovered by lawyers and judges must certainly have fueled the confidence in the Supreme Court's international law jurisprudence. The late 19th century view of international law was influenced by the emerging positivism of the time and reflected a strong analytical and legalistic emphasis.[64] Whatever its philosophical underpinnings, the jurisprudence of the Marshall Court, and the Supreme Court's early recognition that international law is part of the laws of the United States, was reaffirmed and revitalized time and again by successive generations of jurists.

American Idealism in the Midst of War

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[62] J.W. EHRLICH, I EHRLICH'S BLACKSTONE 10 (1959).

[63] One scholarly development in the area of international law in relation to American jurisprudence and foreign policy was the establishment of the American Society of International law in 1906, with the mission of studying "international law and to promote the establishment and maintenance of international relations on the basis of law and justice." *See* Overview, American Society of International Law, *available at* http://www.asil.org/mission.cfm.

[64] *See, e.g., See* John Austin, "The Province of Jurisprudence Determined," London University Lectures (1832); THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USE OF THE STUDY OF JURISPRUDENCE, (Hackett Pub. Co. Inc. 1998) (1832); Sir Thomas Holland, *Lectures on International Law,* (Clarendon Press, Oxford, 1933); Winston P. Nagan and Aitza H. Haddad, *Sovereignty in Theory and Practice,* San Diego International Law Journal (Spring 2012), at 12.

Historic events in the early 20th century forced America from its isolationist roots and also catalyzed the development of international law and institutions to give effect to that body of law. It may be that the U.S. entry into World War I was in fact founded on the recognition that Germany was violating the rights of a neutral party under international law.[65] The United States had been an active promoter of international peace and security prior to World War I. President Roosevelt, for example, mediated the peace negotiations between Japan and Russia following their war fought in China and Korea in 1904-05, and received the Nobel Peace Prize for it.[66]

The trend toward a more sustained U.S. presence in international relations emerged from Woodrow Wilson's efforts to give meaning to the cliché that World War I was a war to end all wars.[67] Wilson had an extremely ambitious view of what the post-war peace process should deliver, as was reflected in his famous Fourteen Points post-war vision.[68] Importantly, Wilson's initiatives included a commitment to the establishment of a

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[65] On August 2, 1914, the German Ambassador at Brussels, Von Below Saleske delivered a letter to his Belgium counterpart demanding safe passage for German troops to march across Belgium in order to launch a surprise attack on France. The request amounted to an ultimatum which Belgium refused. The First World War began the next day.

[66] *See* RICHARD CONNAUGHTON, RISING SUN AND TUMBLING BEAR: RUSSIA'S WAR WITH JAPAN, 343-344. (cassell, 1988).

[67] The background to Wilson is summarized in ROBERT D. SCHULZINGER, U.S. DIPLOMACY SINCE 1900 43-44 (4th ed. 1998). On the final decision to enter the Great War, *see id.*, p. 76-81.

[68] Wilson's effort to remake the global social and political process in the aftermath of the war was codified in his Fourteen Point Peace Program. *See* SCHULZINGER, *Id.* at p. 87-90. Wilson's Fourteen Points included a variety of ambitious goals related to international affairs designed to limit the likelihood of war in the future, including, *inter alia,* open conferences for peace negotiations, freedom of navigation on the high seas, removal of trade barriers, and arms reductions. *See* Address to Congress by President Woodrow Wilson, January 8th, 1918. "Fourteen Points". ENCYCLOPÆDIA BRITANNICA, *available at* http://www.britannica.com/EBchecked/topic/215178/Fourteen-Points.

League of Nations.[69] Additionally, Wilson was influential in denting the assumption of the colonial powers of business as usual. Thus, the German colonies were subjected to a mandate under the League, which recognized the ultimate independence of non-self governing peoples as a "sacred trust of civilization."[70] This bold initiative in U.S. foreign relations was certainly one of the most ambitious undertakings by an American President. Wilson had to contend with adversaries on both sides of the Atlantic. Although there was popular support for the League idea in Europe, it was difficult to get the victorious allies to fully commit to the idea.[71] Further, Wilson's prolonged presence at the Versailles peace negotiations meant that the President was unable to generate enough political support for the League idea at home. It is very possible to see Wilsonian idealism as a significant influence on his entering the war on the side of the allies, and his effort to shape the peace process and its aftermath. In this sense, American exceptionalism had morphed from one rooted in isolationism to one of idealistic international leadership.

Wilson's stroke and untimely death were unfortunate for the internationalist constituency in the United States. Led by Wilson's chief political opponent, Henry Cabot Lodge, U.S. participation in the League of Nation was defeated in the Senate.[72] It is commonly seen as a victory for isolationism and a

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[69] ENCYCLOPÆDIA BRITANNICA, *supra* note 68, at point 14 ("A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike.").

[70] League of Nations Covenant art. 22, para. 1.

[71] *See* MACMILLAN, *supra* note 16.

[72] The Senate rejected, by a vote of 39 for and 55 against, the League of Nations treaty on November 19, 1919. Lodge was a Senator and a Republican from Massachusetts. He was a spokesman for so-called conservative internationalism and served as Chairman of the Senate

sense of a mutated form of American exceptionalism.[73] During the inter-war years, the American mood was isolationist as Germany under Hitler became more assertive in Europe and the United States struggled through the Great Depression.[74] However, within the framework of executive authority the United States remained actively involved in promoting arms control and peace developments.[75] Although the Roosevelt administration recognized the threats posed by totalitarian Germany and imperial Japan,

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Foreign Relations Committee, 1990-1994. It has been pointed out that not only were Wilson and Lodge political rivals, but they hated each other. Lodge on the other hand, poured scorn on Wilson's moralizing and his vanity. According to Schulzinger, "The Senator believed that Wilson thought he was better than others, while Lodge knew that actually he surpassed his own colleagues." SCHULZINGER, *supra* note 67, at 99-103. There is a suggestion that Lodge's envy was the most "corrosive emotion." *Id.* at 103. Historians have also suggested that the failure of the Senate to give its advice and consent to joining the League stems from the botched and uncompromising domestic handling of the covenant. Wilson spent too much time focused on the securing a lasting peace while in Europe and not enough time on handling a domestic population eager to return to relative peace and isolation. When conservatives in the senate expressed concern about the League of Nations, Wilson took his message on the stump, trying to appeal to the voters directly, which did not persuade the Senate to get behind the President's internationalist agenda. *See generally,* MACMILLAN, *supra* note 16.

[73] Insights into American exceptionalism and foreign policy are found in SCHULZINGER, *supra* note 67, at 11, 39, 44, 81. It is suggested that the U.S. entry into the war, regardless of Wilson's idealistic exceptionalism, essentially made the United States another great power, like others.

[74] In the inter-war years, Congress passed a number of laws designed to keep the United States from becoming involved in the rising tensions in Europe. These legislative acts were known as the Neutrality Acts. *See* NEFF, *supra* note 46, at 308-09; Neutrality Act of 1935, 49 Stat. 1081; U.S. Department of State, Office of the Historian, "The Neutrality Acts, 1930s," *available at* http://history.state.gov/milestones/1921-1936/Neutrality_acts.

[75] *See, e.g.,* Treaty Providing for the Renunciation of War as an Instrument of National Policy, August 27, 1928, 46 Stat. 2343 R.S. No. 796, 2 Bevans 732; Papers Relating to the Foreign Relations of the United States: 1922, Vol. 1, pp. 247-266 (discussing the Washington Conference on the limitation of armaments, particularly navies).

Roosevelt was securely bound by isolationists' support for rigorous neutrality (what Secretary of State Stimson referred to as "ostich-like isolationism").[76] There was a certain genius in the Roosevelt administration's policies, which rhetorically respected neutrality but in practice found ways of helping its allies.[77]

On December 7, 1941, Japanese Navy and air units launched a devastating air strike on the U.S. Navy in Pearl Harbor.[78] The United States entered World War II on the side of Britain and the allies.[79] After the Japanese aggression, the voices of isolationism were in significant retreat and very little was heard from this constituency during the war.[80]

During the formative stages of the U.S. engagement in the conflict, Roosevelt delivered to Congress his Four Freedoms speech.[81] This speech contained the war aims of the United

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[76] *See supra* note 73; NEFF, *supra* note 46, at 309.

[77] For example, Congress approved of President Roosevelt's lend-lease program on March 11, 1941. Under the lend-lease program, the United States "loaned" substantial military assets to Great Britain, the Soviet Union, and other allies in their fight against the Nazis. This allowed the United States to assist its allies in the war effort in the period before the American public was willing to commit to sending troops into harm's way.

[78] *See* U.S. Naval History and Heritage Command, "Overview of The Pearl Harbor Attack, 7 December 1941, *available at* http://www.history.navy.mil/faqs/faq66-1.htm.

[79] *Id.*

[80] Republican nominee for President Wendell Wilkie began campaigning for an end to American isolationism after his defeat by President Roosevelt in the election of 1940. An audio recording of Wilkie calling for an end to American isolationism is *available at* http://www.history.com/audio/speeches-wendell-l-wilkie-calls-for-an-end-to-american-isolationism#speeches-wendell-l-wilkie-calls-for-an-end-to-american-isolationism.

[81] *See* Franklin Delano Roosevelt, *Eighth Annual Message to Congress* (Jan. 6, 1941), *in* 3 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790-1966, at 2855 (Fred L. Israel ed., 1966), *available at* http://www.americanrhetoric.com/speeches/fdrthefourfreedoms.htm. The

States, and Roosevelt's recognition that such a vicious and costly war had to be about more than simply defeating the Germans and Japanese. To that end, Roosevelt framed the war as a fight for the freedom of speech and expression, freedom of conscience and belief, freedom from fear and freedom from want.[82] These aims were imposed on the allies as well.[83] The aims stressed four fundamental freedoms to which the United States was committed and which became the foundational principles upon which the war was fought. As the post-war world was planned for, the U.N. Charter was created, largely based on the values codified in the Four Freedoms (as reaffirmed in the Atlantic Charter) – values that are deep at the core of American idealism and the Wilson-Roosevelt strain of exceptionalism.[84] It is

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speech was devoted to an attack on isolationism. State of the Union Address to Congress, Jan. 6, 1941 transcribed by American Rhetoric. In the speech he declared there were four essential human freedoms that the world should strive to obtain: the freedom of speech and expression everywhere in the world, the freedom of religion everywhere in the world, the freedom from want, and the freedom from fear. Roosevelt noted "The future and the safety of our country and our democracy are overwhelmingly involved in events far beyond our borders." *Id.* In Roosevelt's view the commitment to a healthy and strong democracy included a number of New Deal values. These included "equality of opportunity for youth and others; jobs for those who can work; security for those who need it; termination of special privileges for the few; preservation of civil liberties for all; enjoyment of the fruits of scientific progress in a wider and constantly rising standard of living." *See* CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 80-81 (2004). What was critical in Roosevelt's speech was not only his vision for a more just America, but that these ideas suggested a future "which we seek to make secure" as "we look forward to a world founded on four essential human freedoms." *Id.* at 81. Roosevelt's final thought on this crystallization of fundamental New Deal American values was no "vision of a distant millennium." Rather he considered it to be "a definite basis for a kind of world attainable in our own time and generation." *Id.* at 82.

[82] *Id.*

[83] *Id.*

[84] The Four Freedoms speech was followed by the Atlantic Charter which was issued on August 14, 1941. The Atlantic Charter was the result of

possible to view the Four Freedoms as an expression of the most vital and fundamental principles of American foreign policy. To the extent that this expression of U.S. foreign policy became a foundation stone for post-war political and legal arrangements for the world community, it indicates that the foreign policy goals and values in the Four Freedoms became the foundation of a new international law based on the U.N. Charter.

The four freedoms represented, as well, the quintessence of the Roosevelt New Deal. To this extent modern international law evolved from a dominant view of U.S. politics from the perspective of the humanistic promises of the human rights based New Deal.

International Law, the Cold War, Isolationism and Human Rights

The United States and the Soviet Union emerged as the two dominant global powers following the Second World War, and they were divided by deeply entrenched ideology and beliefs. As the Iron Curtain came down, the United States was faced with a global order in which it represented the forces of liberty and democracy against those of totalitarian order. The documentary

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a meeting between Roosevelt and Churchill, and was issued as a joint declaration. The Atlantic Charter embodied, *inter* alia, the Four Freedoms. The central idea that Roosevelt had in mind was that the Charter would serve as an objective codification of the war aims of the allies. According to Roosevelt, the Atlantic Charter is a "declaration of principles at this time [that] presents a goal which is worthwhile for our civilization to seek." He added that these freedoms "are a part of the whole freedom for which we strive." *See* President Roosevelt's Message To Congress on the Atlantic Charter, August 21, 1941, *available at* http://avalon.law.yale.edu/wwii/atcmess.asp; The Atlantic Charter is *available at* http://avalon.law.yale.edu/wwii/atlantic.asp. The Atlantic Charter was later adopted by the United Nations, *See* U.N. General Assembly, *Appeal to the great Powers to renew their efforts to compose their differences and establish a lasting peace*, 3 November 1948, A/RES/190, *available at* http://www.unhcr.org/refworld/docid/3b00f0900.html ; *See also*, Edward A. Laing, *The Contribution of the Atlantic Charter to Human Rights Law and Humanitarian Universalism,* 26 Willamette L. Rev. 113 (1989-1990).

foundations of modern human rights law emerged from President Roosevelt's (and Eleanor Roosevelt's) efforts and post-UN Charter momentum.[85] The human rights developments at the international level were beginning to accelerate when Republicans returned to office. Although the United States was an initiator and an important force in the development of Charter based human rights, it was simultaneously incapable of getting human rights treaties through the Senate's advice and consent procedure.[86] Conservative Senators could muster a blocking third of the Senate to kill such initiatives. Influencing these developments was the skepticism that the defense and promotion of international human rights was a matter of national interest for the United States. Further, many conservatives saw in the human rights documents all the worst aspects of the New Deal.[87]

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[85] *See* UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III); UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195; UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171; UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3; UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13; UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85. UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

[86] *See generally,* Natalie Hevener Kaufman & David Whiteman, *Opposition to Human Rights Treaties in The United States Senate: The Legacy of the Bricker Amendment*, 10 Hum. Rts. Q. 309 (1988).

[87] Kaufman and Whiteman catalogued many of the charges leveled against human rights treaties in the 1950s. It was argued that human rights treaties would actually diminish basic human rights because once a treaty was ratified it would supersede Constitutional protections; violate states rights; promote world government; subject citizens to trial abroad; threaten the American form of government; enhance soviet

Conservative skeptics and southern segregationists were also deeply concerned about the human rights implications for race relations.[88] These concerns were often intertwined with the vigorous opposition in the Senate to the convention criminalizing genocide.[89] An often used metaphor was that human rights treaties, like the genocide convention, would serve as Trojan Horses: attractive on the surface, but filled with nefarious traps, that would ultimately "destroy[] State laws and constitutions and [leave] behind the wreckage of the dream of the Founding Fathers . . . ."[90] The voluble leader of the isolationists was Senator, and former Republican nominee for vice-president, John Bricker.[91] Bricker went on record as stating that he wanted to bury the human rights covenants "so deep that

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and communist influence; infringe on domestic jurisdiction; and increase international entanglements! Kaufman and Whiteman, *Id.* at 321-29; *See also,* U.S. Congress. Senate. Committee on the Judiciary Subcommittee on Constitutional Amendments. *Hearings on S. R. Res. 1 and S. J. Res. 43, Treaties and Executive Agreements.* 83rd Cong., 1st sess., 1953. S. Rept. 2-3.

[88] *See e.g.,* Senate Judiciary Committee Hearings, 1953, *supra* note 86, at 116 (where respected attorney Eberhard Deutsch disapprovingly noted that human rights treaties had "recently been cited with great force as a prohibition of race segregation in the District of Columbia, in Kansas, and in other States.").

[89] *Id.* at 115-16 where Deutsch testified that "the gilding of multipartite treaties with such idealistic immediate goals as the prevention of genocide and the promotion of human rights cannot conceal their underlying long-range objective to destroy local government while expanding the sphere of national power." Testimony by another opponent of human rights treaties warned that "the Genocide Convention is still on the agenda of the Senate for ratification, which, if ratified, would, among other things, commit us to the principle of the trial of American citizens in foreign courts . . . where our constitutional trial procedures and Bill of Rights would not operate." *Id.* at 143-44.

[90] *Id.* at 119; Kaufman and Whiteman, *supra* note 86, at 324.

[91] *See generally Id;* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker,* 89 Am. J. In't L. 341 (1995).

no one holding high public office will ever dare to attempt [their] resurrection."[92]

The fears generated in right wing circles in the 1950s were heavily influenced by fear of racial integration.[93] It will be recalled that it was only in 1954 that the Supreme Court constitutionally outlawed racial segregation in public schools.[94] The first civil rights bills since Reconstruction were also beginning to be enacted.[95] The state of human rights and international law seemed to reflect divisions in American society over both race relations and the organizing political ideology of the different political parties.[96] For the descendants of the New Deal, racial equality and the active promotion of anti-genocide policies and practices were matters that provided faith and confidence in international law. For the descendents of Henry Cabot Lodge and the old right wing, external interference with race relations and social structure invaded the isolationist's zone of security and impugned the isolationist's sense of exceptionalism.

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[92] Congressional Record. 82nd Cong., 1st sess., 1951. Vol. 97, pt. 8, 8263; *See also* Kaufman and Whiteman, *supra* note 86, at 309-10. In 1971, Senator Bricker further stated that "I do not want to live to see the day that the Constitution of the United States and the Bill of Rights becomes a mere scrap of paper, and [the Genocide Convention], if ratified, would be the beginning of such a process." U.S. Congress. Senate. Committee on Foreign Relations. Subcommittee on the Genocide Convention. *Hearings on the Genocide Convention*. 92nd Cong., 1st sess., 1971. 137-39.

[93] *See supra* note 86.

[94] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

[95] *See* The Civil Rights Act of 1957, Pub.L. 85-315, 71 Stat. 634, enacted September 9, 1957; The Civil Rights Act of 1960 (Pub.L. 86-449, 74 Stat. 89, enacted May 6, 1960).

[96] *See generally,* Curtis A. Bradley, *The United States and Human Rights Treaties: Race Relations, The Cold War, and Constitutionalism*, Chinese J.I.L. 321-344 (2010).

The embarrassment of a blocking minority of Conservative Senators led Congress to act in a different way. Congress amended the Foreign Assistance Act to make foreign assistance from the United States a matter conditioned upon improving human rights performance.[97] Moreover, later administrations bureaucratized human rights concerns in creating an office of human rights in the Department of State and by producing an annual report on human rights for Congress.[98]

These developments culminated in the initiative of President Jimmy Carter who succeeded in making human rights an institutional part of U.S. foreign policy.[99] Carter's efforts domesticated and helped add concerns of human rights abroad to the political agenda at home. Though Carter did face continued opposition in the Senate to a number of his human rights initiatives.[100] For example, one opponent to the Covenant on Civil and Political Rights argued before the Senate Committee on Foreign Relations in 1979 that the covenant would subject women to the draft and "change the marriage laws of most of the 50 states by imposing 'equality of rights' as between the spouses during marriage . . . ."[101] Regardless, Republican and Democratic presidents following Carter continued his initiatives in promoting human rights and democracy abroad. As it turned out,

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[97] *See* §502(b) of The Foreign Assistance Act, 22 U.S.C. §2151 (1961) (as amended in 1974).

[98] *See* U.S. Department of State, Bureau of Democracy, Human Rights, and Labor website, *available at* http://www.state.gov/j/drl/.

[99] *See generally,* David F. Schmitz and Vanessa Walker, *Jimmy Carter and the Foreign Policy of Human Rights: The Development of a Post-Cold War Foreign Policy*, Vol. 28, Issue 1, 113-43, January 2004.

[100] *See* U.S. Congress. Senate. Committee on Foreign Relations. *Hearings on International Human Rights Treaties.* 96th Cong., 1st sess., 1979. S. Rept. 8; Kaufman and Whiteman, *supra* note 86, at 329-331.

[101] U.S. Senate Foreign Relations Committee Hearings, 1979, *supra* note 100, at 105, 108.

President Reagan was able to mobilize his considerable political assets to secure the advice and consent of the Senate to the Genocide Convention, after it had languished in the Senate for thirty-eight years.[102] President Bush (the senior) was largely responsible for getting the Senate's advice and consent for the Torture Convention[103] and the Convention on Civil and Political Rights.[104] These initiatives paved the way for Clinton's success in securing passage of the Convention that Outlaws Racial Discrimination.[105] Promotion of human rights abroad appeared to have become a (sometimes secondary) fixture of American foreign policy.

International Law and Post-War Security Issues

The international law implicated in human rights was influenced by the distinctive problems of post-war global security. The development of nuclear arsenals lead John Foster Dulles to declare that in light of the nuclear age the U.N. Charter had become obsolete.[106] Clearly, the development and

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[102] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, (entered into force on January 12, 1951). The United States Senate gave its advice and consent to the ratification of the Convention on February 10,1986; *See also*, Winston P. Nagan, *The Politics of Ratification: The Potential for United States Adoption and Enforcement of the Convention Against Torture, the Covenants on Civil and Political Rights and Economic, Social and Cultural Rights*, 20 GA. J. INT'L & COMP. L. 311, 311 (1990).

[103] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 UNTS 85.

[104] International Covenant on Civil and Political Rights Convention (I.C.C.P.R.), Dec. 16, 1966, 999 U.N.T.S. 171, (entered into force March 23, 1976, ratified by the U.S. in 1992).

[105] Convention on the Elimination of All Forms of Racial Discrimination (CERD), December 21, 1965, 660 U.N.T.S. 195, (entered into force, January 4, 1969, ratified by the U.S. in 1994).

[106] The tension between the technological advances of nuclear weapons and the U.N. Charter is indicated in Dulles's idea that the Charter was "a pre-atomic age" constitution; it was, he held:

strategic deployment of weapons of mass destruction raised a particular concern that law as an institution was not competent to have a definitive role in the high stakes issues of nuclear brinkmanship.[107] It must be conceded that the U.N. rules concerning the use of force and the scope of self-defense were inadequate in the changing face of the new forms of post-war conflict, significantly, but not exclusively in relation to the use of nuclear weapons.[108] (The Obama administration's post-Cold War national security posture seeks to significantly distance itself from the bipolar world's limitations on international law and is at least rhetorically moving toward a great reliance on law in the control and regulation of nuclear arsenals.[109])

> obsolete before it actually came into force. As one who was at San Francisco, I can say with confidence that if the delegates there had known that the mysterious and immeasurable power of the atom would be available as a means of mass destruction, the provisions of the Charter dealing with disarmament and the regulation of armaments would have been far more emphatic and realistic.

John Foster Dulles, The Challenge of Our Time: Peace with Justice, 38 A.B.A. J. 1063, 1066 (1953).

[107] *But see,* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996. (where the I.C.J. offered an opinion on the international law implications of the use of nuclear weapons).

[108] In 1977, two protocols to the 1949 Geneva Conventions regulating conduct during warfare were promulgated to address some of the changes in the way conflicts were being fought in the post World War II era, including the increased movement of conflict to towns and cities, the increased civilian involvement in armed conflict, and the dramatic increase in guerrilla warfare. The second Additional Protocol in particular was intended to protect victims of non-international armed conflicts. *See* International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609; RONALD SLYE AND BETH VAN SCHAACK, INTERNATIONAL CRIMINAL LAWS: ESSENTIALS 170 (Wolters Kluwer, 2008).

[109] *See* Speech by President Obama in Prague, Czech Republic, April 5, 2009, *available at* http://www.cfr.org/proliferation/obamas-speech-prague-april-2009/p20960 (stating, regarding the Nuclear Non-

With the Iraqi invasion of Kuwait in the 1990s, there was a return to a conventional state-to-state conflict as the Cold War came to a close.[110] The conflict fell within the authority of the Charter and the major powers in the Security Council to restore peace.[111] Very soon the early promise of U.N. security began to crystallize in the form of collective security intervention. It seems as if the U.N. Charter in the aftermath of the Cold War was experiencing a new lease on life.

Despite the apparent success of the U.N. collective security system in the Gulf War, the problems of intervention remain genuinely complicated and dangerous.[112]

Security Issues and Terrorism

The tragic events of 9/11 caught the Bush administration and the nation by surprise. Very quickly, Bush administration officials "reprioritized '*freedom from fear*' as the number one

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Proliferation Treaty, "To strengthen the treaty, we should embrace several principles. We need more resources and authority to strengthen international inspections. We need real and immediate consequences for countries caught breaking the rules or trying to leave the treaty without cause." And also calling for more "durable international institutions.").

[110] *See* Michael R. Gordon, *Iraq Army Invades Capital of Kuwait in Fierce Fighting*, N.Y. TIMES, August 2, 1990.

[111] *See* U.N. Chart., Arts. 39-51 (vesting the Security Council with the authority to respond to international aggressions with force, and to require U.N. member states in assisting the restoration of peace); *See also* UN Security Council, *Resolution 660 (1990) Adopted by the Security Council at its 2932nd meeting, on 2 August 1990*, 2 August 1990, S/RES/660 (1990) (condemning the Iraqi invasion of Kuwait and demanding the withdrawal of Iraqi troops); UN Security Council, *Resolution 678 (1990) Adopted by the Security Council at its 2963rd meeting, on 29 November 1990*, 29 November 1990, S/RES/678 (1990) (authorizing the use of force against Iraq to implement resolution 660 and to "restore international peace and security").

[112] *See* Donatella Lorch, *Last of the U.S. Troops Leave Somalia*, N.Y. TIMES, Mar. 26, 1994, at A1; Elaine Sciolino, *The Somalia Mission: The U.N.'s Glow is Gone*, N.Y. TIMES, Oct. 9, 1993, at A1.

freedom the American people need to preserve."[113] The initial reaction of the administration was that since the attack came from a shadowy terrorist operation it fell outside of the boundaries of conventional international law.[114] Since there was no law which effectually regulated such conduct, the administration initially felt it might have a free hand to craft an appropriate response as it saw fit.[115] Thus the Bush war on terror emerged from a complex discourse within and outside the administration regarding whether international law could be construed to serve U.S. interests or stood as a stumbling block to the expression of those interests.[116] The administration produced a collection of documents which became the New Bush Doctrine.[117] The administration articulated a broad view of preemption which today is still considered to be a contested construction of the law of self-defense under international law.[118] In our view, the Bush Doctrine provided a reasonable analysis of the asymmetrical nature of the terrorist threat and

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[113] Koh, *supra* note 4, at 1498.

[114] *See* Barton Gellman and Jo Becker, *Pushing the Envelope on Presidential Power*, WASHINGTON POST, June 25, 2007.

[115] *But see,* JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 69 (2007) stating:

> Many people think the Bush administration has been indifferent to wartime legal constraints. But the opposite is true: the administration has been strangled by law, and since September 11, 2001, this war has been lawyered to death. The administration has paid attention to law not necessarily because it wanted to, but rather because it [believed that it] had no choice.

See also, KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS 189-224 (W.W. Norton, 2011).

[116] Memo of the General Counsel of the Department of Defense, April 1, 2003, *supra* note 5.

[117] *See generally*, John Alan Cohan, *The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law*, 15 Pace Int'l L. Rev. 283 (2003).

[118] *Id.*

why a preemptive form of self-defense is justifiable under international law, at least in some circumstances. However, the Bush Administration also articulated the notion that some countries could be characterized as "rogue" states, and therefore, subject to preemptive intervention on the part of the United States without adherence to the *jus ad bellum*.

Unfortunately, the Bush administration did not provide a more careful analysis of the nature of states falling outside of international standards of non-intervention. In should also be recognized that international law does itself display a weakness here. It may be this weakness that the Bush administration felt undermined the U.S. national interest.[119] International law defines a sovereign state in terms of territory, population, domestic control and foreign relations capacity.[120] This does not give a sufficient test for whether a particular state is an abuser of the protection granted to sovereignty by international law and therefore subject to lose its sovereign protections (such as being free from the armed attacks of other states). Encased in the international criteria of sovereignty there are a

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[119] *See* U.S. DEP'T OF DEF., THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 6 (2005), *available at* http://www.defenselink.mil/news/Apr2005/d20050408strategy.pdf; *See also,* Michael P. Scharf, *International Law in Crisis: A Qualitative Empirical Contribution to Compliance Debate,* 31 CARDOZO L. REV. 45, 56 (2009).

[120] The definition of "sovereignty" is, in part, "the supreme political authority of an independent state." BLACK'S LAW DICTIONARY 1402 (7th ed. 1996). "Sovereign power" is defined as "the power to make and enforce laws." *Id.* at 1401. A contemporary definition of "State" was offered by Opinion No. 1 of the Badinter Commission (Commission d'Arbitrage de la Conference de la Paix en Yougoslavie) and requires "a population subject to an organized political authority." Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, Opinion No. 1, 31 I.L.M. 1488, 1495 (1992).

multitude of problematic states.[121] Rogue state is one; others include states controlled by organized crime, kleptocratic states, genocidal state, failed states, and garrison states, to list the most notorious forms of statehood which may be regarded as abusers of state sovereignty.[122] This suggests a degree of uncertainty in terms of the precise normative standards of international law and how foreign relations will be challenged in terms of national interests that are implicated in states who abuse their sovereignty.[123] But for the Bush administration to see gray areas, and then conclude that international law represents "strateg[ies] of the weak" that threaten "[o]ur strength as a nation state" seems greatly overstated.[124]

The war on terror also generated strong tensions between the more obvious requirements of international law relating to the treatment of detainees in the war on terror.[125] These tensions are too numerous to mention in this brief analysis. However, it should be noted that the rejection of the Geneva Conventions as being at all relevant to the status of detainees was itself modified when Attorney General Gonzales determined that his earlier position on the Geneva Conventions was wrong.[126] Another contentious issue emerged from aggressive interrogations of detainees under U.S. control.[127] The United States has

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[121] *See generally* Winston P. Nagan & Craig Hammer, The Changing Character of Sovereignty in International Law and International Relations, 43 Colum. J. Transnat'l L. 141 at 160 (2004).

[122] *Id.* at 171-176.

[123] *See generally, Id.* at 152.

[124] THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA, *supra* note 119.

[125] *See* Koh, *supra* note 4 at 1509-15.

[126] *See* Eric Lichtblau, *Gonzales Speaks Against Torture During Hearing*, N.Y. TIMES, Jan. 7, 2005.

[127] For an overview of the legal issues implicating torture and disappearances *see* Jordan J. Paust, *Civil Liability of Bush, Cheney,*

ratified the Convention that Outlaws Torture.[128] The Bush administration sought to redefine torture in a memo written by Jay Bybee suggesting that torture covered only acts leading to organ failure or the prospect of death.[129]

In his memorandum Bybee cited as authority my (Winston Nagan's) testimony before the Senate in the hearings on the Torture Convention.[130] In those hearings I had drawn the attention of the Senate to worse case scenarios involving the use of torture around the world. I had given an illustration of the gouging out of a child's eyes as well as the chopping off of limbs.[131] Nowhere did I suggest these worst case illustrations were meant to be the threshold of lawful behavior or an official definition of torture. When Gonzales's replacement as Attorney General was asked whether water boarding was torture, he declined to answer.[132] Serious efforts were made to develop coercive interrogation procedures that fell short of some sort of definition of torture, and that if they in fact did, according to one Bush administration official, "self-defense

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et al for Torture, Cruel, Inhuman and Degrading Treatment and Forced Disappearance, 42 CASE W. RES. J. INT'L L., 359-388 (2009). *See also,* JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE 'WAR' ON TERROR (Cambridge, 2007); *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 Val. U. L. Rev. 1535 (2009). The literature on this is vast.

[128] *See* The Convention Against Torture, *supra* note 103.

[129] *See* Jay Bybee, Memorandum for Alberto R. Gonzales Counsel to the President, Regarding Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, August 1, 2002, *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf; *See also,* John C. Yoo, *Memorandum for William J. Haynes II, supra* note 33; LARRY SIEMS, WHAT THE DOCUMENTS SAY ABOUT AMERICA'S POST-9/11 TORTURE PROGRAM, (O/R books, 2012).

[130] *See* Convention Before the Senate Comm. On Foreign Relations, 101st Cong. At 45 (1990).

[131] *Id.*

[132] *See* Scott Shane and David Stout, *Bush Moves to Save Mukasey Nomination*, N.Y. TIMES, November 1, 2007.

could provide justifications for any criminal liability."[133] Suffice it to say that there remained a conflict about this matter within the Bush administration and a significant conflict within the armed forces. The military's chief lawyers were on the side of a stricter observance of international law and in this they found themselves in conflict with other authorities in the administration.[134] These are not issues that have been fully resolved, and the Obama Administration has been reluctant to take them up, but President Obama has indicated that his administration will not tolerate the use of torture as an instrument of state policy.[135] The perspective that the current administration inherited reflects a deep skepticism that international law could usefully serve U.S. interests. Indeed, it appeared to be an article of faith by some in the Bush administration that international law was an impediment to the prosecution of U.S. national interests.[136] The voluble Ambassador Bolton (Ambassador to the U.N.) indicated "There is no such thing as the United Nations. There is only the international community, which can only be led by the only remaining super

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[133] John C. Yoo, *Memorandum for William J. Haynes II, supra* note 33.

[134] *See* DIANE H. MAZUR, A MORE PERFECT MILITARY: HOW THE CONSTITUTION CAN MAKE OUR MILITARY STRONGER 123-24 (Oxford, 2010) (explaining that senior JAGs of each of the service branches objected to civilian legal advice ('the torture memos') concluding that most physical and mental abuse couldn't be defined as torture and, even if those acts were torture, federal laws (including the Uniform Code of Military Justice) prohibiting torture couldn't be enforced if the President believed torture was necessary for national security). *See also* Jane Mayer, *The Memo: How an internal effort to ban the abuse and torture of detainees was thwarted*, THE NEW YORKER, Feb. 27, 2006, (last visited 7/22/10);

[135] *See* Scott Shane, Mark Mazzeti, and Helene Cooper, *Obama reverses key Bush security policies,* N.Y. TIMES, Jan. 23, 2009.

[136] *See* Peter J. Spiro, *The New Sovereigntists: American Exceptionalism and its False Prophets*, FOREIGN AFFAIRS, Nov/Dec 2000.

power, which is the United States."[137] Ambassador Bolton's remarks on international law were even more startling. He said for example,

> It is a big mistake for us to grant any validity to international law even when it may seem to be in our short term interest to do so, because over the long term the goal of those who think that international law means anything are those who want to constrict the United States.[138]

No. Some of those (including the authors of this article) who think international law "means something," do so not to constrict the United States, but to help keep it secure, and to promote its legitimate foreign relations interests in an often dangerous world.

The Status of International Courts

The United States historically has been a supporter of international arbitration and the creation of the Permanent Court of International Justice and its successor, the International Court of Justice (I.C.J.).[139] It has had recourse

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[137] Roland Watson, *Bush deploys hawk as new UN envoy*, THE TIMES (London), March 3, 2005.

[138] *See* Samantha Power, *Boltonism*, THE NEW YORKER, Mar. 21, 2005, at 23, *available at* http://www.newyorker.com/archive/2005/03/21/050321ta_talk_power (last visited 7/18/12); *See also,* John R. Bolton, *Is There Really "Law" in International Affairs*, 10 TRANSNAT'L L. & CONTEMP. PROBS. 1, 48 (2000) (stating that "International law is not law; it is a series of political and moral arrangements that stand or fall on their own merits, and anything else is simply theology and superstition masquerading as law.").

[139] *See* Koh, *supra* note 4 at 1506-07 (noting "Although the United States was neither a member of the League of Nations nor a party to the statute of the Permanent Court of International Justice, an eminent American [Elihu Root] participated in the drafting of the Permanent Court's statute, Americans regularly nominated candidates to be judges, and four Americans were successively elected as PCIJ judges."). The charter for the International Court of Justice is actually a component of the U.N. Charter.

to the courts and success before the courts.[140] Additionally, the United States was a pioneer and lead player in the establishment of the Tribunals set up to try the war criminals of Nazi Germany and imperial Japan.[141] U.S. enthusiasm for international courts (at least for being a possible defendant at them) chilled significantly in the 1980s, and the Reagan administration ultimately decided, after the *Nicaragua* litigation before the I.C.J., to withdraw its consent to compulsory jurisdiction at the court.[142] To a large extent the Reagan administration's withdrawal from compulsory jurisdiction reflected a concern that important national security issues of the nation ought not to be litigated before the I.C.J. Similarly, the United States did not look favorably on the I.C.J. providing an advisory opinion on the question of the threat and or use of nuclear weapons.[143] The role and participation of the United States in international courts remains very problematic.

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[140] *See, e.g.,* Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), Judgment, 1989 I.C.J. 15(1989); Delimitation of Maritime Boundary in Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246 (Oct. 12); Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran); Request for Indication of Provisional Measures, 15 XII 79, International Court of Justice (ICJ), 15 December 1979;

[141] *See* Cherif Bassiouni, *Nuremberg Forty Years After: An Introduction*, 18 Case W. Res. J. Int'l L. 261 (1986) (discussing both the accomplishments and disappointments of the Nuremberg tribunals).

[142] *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 1 (June 27). Three days before Nicaragua filed its application to commence suit, the United States filed a document with the I.C.J. saying that it would not view itself as subject to I.C.J. jurisdiction for a period of two years on disputes "related to events in Central America." *See* Ilene R. Cohn, *Nicaragua v. United States: Pre-Seisin Reciprocity and the Race to The Hague*, 46 Ohio St. L. J. 699 (1985). Following the decision in *Nicaragua*, the United State vetoed a draft Security Council resolution calling for compliance with the judgment. *See* U.N. Doc. S/18428 (Oct. 28, 1986) (vetoed by S.C. Doc. S/PV.2718 (Oct. 28, 1986)).

[143] *See* I.C.J. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, *supra* note 107.

In 2008 the Supreme Court decided the *Medellin* case.[144] The case stemmed from litigation before the I.C.J. based on a claim by the government of Mexico that José Medellin and other Mexican citizens had been denied their consular rights under the Vienna Consular Treaty, to which both the United States and Mexico are parties.[145] The relevant provision of the treaty guaranteed assistance from Mexican consular authorities prior to Mexican nationals' trials and convictions in American state courts.[146] The I.C.J. ruled that the United States was in breach of the Consular Treaty.[147] It therefore referred the case to the United States to take appropriate action.[148] President Bush, showing that his views on international obligations were perhaps more nuanced than those of, say, John Bolton, sent a presidential letter to state authorities indicating that they should comply with the I.C.J. ruling.[149] The question of what the ruling meant

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[144] Medellin 128 S. Ct. 1346, 1355; *See generally,* Winston P. Nagan and Benjamin Goodman, *Inflated Federalism and Deflated International Law: Roberts CJ v. The ICJ,* Global Jurist: Vol. 12: Iss. 1 (Advances), Article 1. (2012).

[145] Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

[146] Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31). Article 36 of the Vienna Convention gives member states' nationals the right to contact their nation's consulate when arrested or detained in the jurisdiction of another member state.

[147] *Id.*

[148] *See* Avena and Other Mexican Nationals (Mexico v. United States of America), press release 2004/16. (explaining that by a vote of fourteen to one, the I.C.J. had voted that the United States was obligated, "by means of its own choosing" to review and reconsideration the convictions and sentences of Mexican nationals tried without assistance from a Mexican consulate).

[149] Memorandum from George W. Bush, President, U.S., to Attorney Gen., U.S., on Compliance with the Decision of the International Court of Justice in Avena, U.S. (Feb. 28, 2005) (President's Memorandum) stating:

> [T]he United States will discharge its international obligations under the decision of the International Court of Justice . . . by

as a matter for domestic courts was litigated and appealed to the Supreme Court.[150] Chief Justice Roberts (a Bush appointee) wrote the decision for the Court, rebuffed the President, and ruled that the I.C.J. decision was not entitled to be honored, and further, that the President's indication the I.C.J. ruling should be given due respect was legally irrelevant.[151] Essentially the Roberts' Court was saying that to provide for the recognition of a foreign international judgment the Court would not be guided by the general principles of comity characteristic of the recognition of foreign judgments, but rather only an act of Congress stipulating that the judgment be recognized would suffice. The *Medellin* case is important here, because it represents a retreat from the deeply rooted practice of the Supreme Court in declaring what international law is within the area of its constitutional competence. We suspect that the influence on the Roberts majority reflects the perspective of the Federalist Society discussed *supra*: specifically, the idea that an I.C.J. judgment should have to be cured of its democracy deficit by a specific act of Congress before binding American courts.[152]

> having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals . . . addressed in that decision. . . .

[150] *See* Medellín v. Texas, 128 S. Ct. 1346, 1356 (2008); *see also, Ex parte* Medellín, 206 S.W.3d 584, 586 (2005); *Ex parte* Medellín, 223 S.W.3d 315, 342–43 (Tex. Crim. App. 2006), *aff'd*, 128 S. Ct 1346 (2008).

[151] Medellin, 128 S. Ct. 1353.

[152] *See* McGinnis & Somin, *supra* note 19; John O. McGinnis and Ilya Somin, "The Political Economy of Customary International Law and the Alien Tort Claims Statute", Public Policy Roundtable, April 29-30, 2010, *available at* http://www.law.northwestern.edu/searlecenter/papers/McGinnis_ATS.pdf (arguing that "Much of modern customary international law as analyzed at the international level is of low quality because of its democracy deficit.").

An area of considerable controversy politically has been the creation of the International Criminal Court (I.C.C.), a controversy which seems to stem from a gross misunderstanding of the jurisdiction of the court.[153] The United States is not a party to the Rome Statue establishing the court (a treaty), and the Bush Administration set out to methodically undermine the jurisdiction of the court with the support of conservatives in Congress.[154] Ostensibly the Bush administration had concerns about the I.C.C. process violating U.S. sovereignty, the fear that the court's process could be politicized, unaccountability of the court, the adequacy of due process and the possibility that aspects of the court's structure and process conflicted with the Constitution.[155] In particular, Bush administration officials attacked the idea of the crime of aggression which they described as excessively elastic.[156] In support of the

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[153] *See generally,* Coalition for the International Criminal Court, *Overview of the United States' Opposition to the International Criminal Court*, November 16, 2006, *available at* http://www.iccnow.org/documents/CICCFS_US_Opposition_to_ICC_11Dec06_final.pdf. The jurisdiction of the I.C.C. is supplemental to that of national courts. Further, *res judicata* will preclude the I.C.C. from revisiting acquittals in a state court, even if the I.C.C. is otherwise competent to hear a case (unless the state court proceedings are akin to show trials).

[154] President Bill Clinton actually signed onto the International Criminal Court Treaty during his final days in office, but President George W. Bush subsequently "unsigned" the treaty upon taking office. *See* Koh, *supra* note 4, at 1486, 1503; Letter from John Bolton, Under Secretary of State for Arms Control and International Security, to Kofi Annan, U.N. Secretary General (May 6, 2002), *available at* http://www.freerepublic.com/focus/news/678762/posts; Edward T. Swaine, *Unsigning*, 55 Stan. L. Rev. 2061 (2003).

[155] *See* Congressional Research Service (CRS) Report for Congress, *U.S. Policy Regarding the International Criminal Court*, August 29, 2006; John R. Bolton, *The Risks and Weaknesses of the International Criminal Court From America's Perspective,* 64 Law and Contemporary Problems 167-180 (2001).

[156] In June 2010, the Review Conference of the Rome Statute adopted a definition of the crime of aggression as "the planning, preparation,

Administration were strident voices in the Senate who described the court "as a monster" which had to be slain.[157] They also suggested that the court should be defeated in the Senate as a prelude to a larger attack on the U.N.[158] (This rhetoric is strikingly similar to that which surrounded opposition to the League of Nations and the Genocide Convention in the 1950s. As Harold Koh has aptly noted, when it comes to American fears of international institutions and law and "American exceptionalism, there is really nothing new under the sun.")[159]

Among the legislative reactions to the I.C.C. was the American Service-Members' Protection Act.[160] In the Senate a prime figure was the North Carolina Senator Jesse Helms, who referred to the I.C.C. as a "U.N. Kangaroo Court where the

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initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations." *See* http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf. A number of specific activities are then included as qualifying as acts of aggression. They include invasion, bombardment, blockade, "attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State", "use of armed forces of one State which are within the territory of another State. . .", and the "sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State" among other activities. *Id.*

[157] Statement of Senator Rod Grams, Subcommittee on the Creation of the International Criminal Court, Hearing on the Creation of the International Criminal Court (23 July 1998). Senator John Ashcroft described the I.C.C. as "a clear and continuing threat to the national interest of the United States." Statement of Senator John Ashcroft, Subcommittee on the Creation of the International Criminal Court, Hearing on the Creation of the International Criminal Court (23 July 1998).

[158] *Id.*

[159] Koh, *supra* note 4, at 1481.

[160] American Servicemembers' Protection Act of 2002, H.R. 4169, 107th Cong., 2d Sess. (2002).

United States has no veto."[161] In the House of Representatives the ubiquitous Tom Delay was the key mover.[162] Efforts to moderate these views came from Senator Chris Dodd of Connecticut.[163] It would be tedious to recount all the strategies used to promote or restrain the U.S. response to the I.C.C. Certainly the final version of the Act was quite different from extreme versions originally generated.[164] The bill essentially gave the President broad waiver authority. It also included Section 3015 known as the Dodd Amendment which allows the United States to cooperate with the I.C.C. in pursuing the prosecution of foreign nationals accused of genocide, war crimes, or crimes against humanity, which it in fact has done.[165]

On August 2, 2002, President Bush signed H.R. 4775 and the American Service-Member's Protection Act became law.[166] Among the effects of the Act was the ability to suspend military assistance to state parties to the I.C.C.[167] An appraisal of the effects of the suspension of military assistance is not yet adequately understood. Clearly, it would have had some effect on

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[161] *See* Transcript of Helms's introduction of the amendment to the National Defense Authorization Act for Fiscal year 2002 (Senate, October 2nd, 2001), *available at* http://thomas.loc.gov/cgi-bin/query/R?r107:FLD001:S10042.

[162] *See* Legislative Watch, Human Rights Brief, 9 Hum. Rts. Br. 34 (2001).

[163] *See* Christopher Marquis, *U.S. Is Seeking Pledges to Shield Its Peacekeepers From Tribunal*, N.Y. TIMES, Aug. 7, 2002, at A1.

[164] *See* The International Criminal Court: Protecting American Servicemen and Officials from the Threat of International Prosecution, Hearing before the Senate Comm. on Foreign Relations, 106th Cong. (2000).

[165] *Id.*

[166] See Human Rights Watch, *U.S.: 'Hague Invasion Act' Becomes Law* (Aug. 2, 2002), *available at* http://www.hrw.org/en/news/2002/08/02/us-hague-invasion-act-becomes-law (last visited 7/23/10).

[167] American Servicemembers' Protection Act, *supra* note 172; CRS Report, *supra* note 155, at 12-13.

national security interests. Additionally, in 2005 Congress adopted a bill known as the Nethercutt Amendment.[168] It provided for the suspension of economic assistance to I.C.C. member states that had not concluded bilateral immunity agreements with the United States as permitted by Article 98 of the Rome Statute.[169] Thus, a further impact on U.S. foreign relations interests would be the restrictions on the use of economic influence to further U.S. national interests, in essence, restricting the carrot approach to foreign relations. These congressionally generated initiatives suggest a massive over-exaggeration in terms of what the I.C.C. could actually do to the legal status of U.S. military personnel. More than that, it created the impression that the United States was declaring war on the I.C.C. at a time when the United States should be helping to lead in the promotion of international justice to preserve its national security.[170] In a broader sense, it suggested not simply disquiet, but hostility to international law.

The American response to the I.C.C. blemishes the modern history of the United States in its inspired creation of post-

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[168] Consolidated Appropriations Act, 2005, Pub. L. No 108-447, 118 Stat. 2809; *See* at 17.

[169] *See* UN General Assembly, *Rome Statute of the International Criminal Court (last amended January 2002)*, 17 July 1998, A/CONF. 183/9, art. 98 para. 1, (providing that "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.").

[170] As President Obama's 2010 NATIONAL SECURITY STRATEGY noted, "From Nuremberg to Yugoslavia to Liberia, the United States has seen that the end of impunity and the promotion of justice are not just moral imperatives; they are stabilizing forces in international affairs. . . ." May, 2010, *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf

war tribunals for the trial of Axis war criminals.[171] Moreover, the United States gave constructive diplomatic support and professional assistance in the success of the *ad hoc* tribunals for the former Yugoslavia and Rwanda.[172] As a report from the Congressional Research Service put it:

> The United States has enjoyed a long reputation for leadership in the struggle against impunity and the quest for universal human rights and the rule of law. Human rights organizations have expressed concern that U.S. refusal to ratify the [I.C.C.] Statute, coupled with any actions that might undermine the ICC, could cause the United States to lose the moral high ground and damage its influence world-wide, including its ability to influence the development of the law of war.[173]

Official antagonism towards the I.C.C. has been ameliorated under the Obama administration, and in practice, the United States has been facilitative and cooperative with the mission of the I.C.C. It is unlikely that the I.C.C. Statute (a treaty) will be approved by the blocking minority in the Senate any time soon. But the Executive has sufficient flexibility to still participate in the I.C.C. process within the limits discussed previously.[174]

The vehement opposition to the I.C.C. in the Bush administration was possibly tied to the problems of the Iraq

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[171] *See* Christian Tomuschat, *The Legacy of Nuremberg,* 4 J. INT'L CRIM. J. 830 (2006)

[172] For example, it was the U.N. Security Council, of which the United States is a veto-wielding permanent member that established the tribunals.

[173] CRS, *supra* note 155, at 22.

[174] *See* National Security Strategy, 2010, *supra* note 119, at 48 noting:

> Although the United States is not at present a party to the Rome Statute of the International Criminal Court (ICC), and will always protect U.S. personnel, we are engaging with State Parties to the Rome Statute on issues of concern and are supporting the ICC's prosecution of those cases that advance U.S. interests and values, consistent with the requirements of U.S. law.

war, which is sometimes called "a war of choice rather than a war of necessity."[175] Scholars such as Franck and the current legal advisor of the State Department, Harold Koh, believe that the United States breached Article 2(4) of the U.N. Charter, which prohibits the use of force against another state with certain exceptions, by invading Iraq in 2003.[176] Moreover, they did not find the preemption doctrine sufficiently flexible to overcome these objections.[177] It may be that Obama also does not want to resurrect the problems of the lawfulness of the Iraq war in the light of contemporary understandings of the U.N. Charter.

In short, a national interest that considers international criminal justice a threat to U.S. foreign relations interest is wrong, unhistorical, and undermines the crucial support of the United States for the international rule of law. U.S. national interests are better protected by promoting the rule of law than by unwarranted fears of international adjudication.

The Values Behind U.S. Foreign Policy and International Law

U.S. interests are more effectively secured when the United States is able to show that those interests coincide with the requirements of international law. Today we have a system of international law that has transformed the global community. The critical question is: Are the values behind the international

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[175] *See generally,* RICHARD A. HAASS, WAR OF NECESSITY, WAR OF CHOICE: A MEMOIR OF TWO IRAQ WARS (Simon and Schuster 2009)

[176] UN Charter article 2(4) provides that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations." This is qualified by Article 51 which gives states the right to use force in self-defense, and the powers of the Security Council to authorize force under Chapter VII of the UN Charter. *See* Koh, *supra* note 4, at 1482. *See also* Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AJIL 88 (2006).

[177] *See* Harold Hongju Koh, *A Better Way to Deal with Iraq,* THE HARTFORD COURANT, October 20, 2002.

system also the values that serve American interests? Perhaps it is worth stepping back and re-examining the Atlantic Charter Declaration of President Roosevelt.[178] As was already noted, the Atlantic Charter was a public articulation of the war aims of the allies. President Roosevelt arm twisted Churchill into signing onto it. It became the explanation for why the allies were fighting. The Four Freedoms also reflected the fundamental values of the dominant public philosophy of the time in the United States namely, the New Deal. The Four Freedoms were reiterated in the fundamental values or keynote principles of the U.N. Charter. The central point is that the Atlantic Charter was a concrete expression of the foreign policy goals and interests of the United States. The Charter is, in turn, the corner stone of modern international law. Driving the creation of the Charter was an important experience which was rooted in the critical problems of world order. The Charter may be seen to represent the values that are critical to guide useful and prudent responses to these problems. Today international law still generates an important framework with which we can identify the problems which provide the decision making challenges for modern international law. It is important to keep in mind when reviewing these challenges that they also represent the problems to which the foreign relations policies of the United States must respond. As the United States is a major power with significant influence in establishing the tactical and strategic norms that guide foreign policy and international law it should be obvious that the values which inform US policy and the values which underline modern international law under the Charter are closely related. These problems include:

1. Global poverty and inequality

[178] *See* n. 84, *supra*.

2. The strategies of global development
3. The crisis of the global environment
4. The global demographic crisis
5. The global health crisis
6. The adequacy of response to global catastrophes
7. The crisis relating to the defense of human rights and humanitarian values
8. The crisis of the global war system and the proliferation of terrorist groups
9. The crisis of global arms control
10. The pending crisis of controlling and regulating weapons of mass destruction

It may be useful to keep these global problems and threats in mind as we review the fundamental values behind the U.N. Charter and modern international law. The following are a summary of the values behind the six keynote precepts found in the U.N. Charter.[179] The opening of the preamble expresses the

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[179] *See* I.C.J. Advisory Opinion on the Threat or Use of Nuclear Weapons, *supra* note 107 at 226 (Dissenting opinion of Judge Weeramantry); U.N. Charter pmbl. The Preamble states:

> We the peoples of the United Nations determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and . . . to practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain international peace and security . . . have resolved to combine our efforts to accomplish these aims.

Id. Article 1(1) of the U.N. Charter provides that the purposes of the United Nations include:

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace. . . .

first standard — that the Charter's authority is rooted in the perspectives of all members of the global community, i.e., the peoples. This is indicated by the words, "we the peoples of the United Nations."[180] Thus, the authority for the international rule of law is not rooted in abstractions like 'sovereignty', 'elite', or 'ruling class', but in the actual perspectives of the world's people, who are the ultimate stakeholders in international law, after all.

The Charter's second key concept embraces the high purpose of saving succeeding generations from the scourge of war.[181] The third is the reference to the "dignity and worth of the human person."[182] What is of cardinal legal, political, and moral import is the idea that international law based on the Charter be interpreted to enhance the dignity and worth of all peoples and individuals, rather than be complicit in the destruction of the core values of human dignity. This principle is at the core of U.S. foreign policy's commitment to human rights, democracy, and labor.[183]

The fourth keynote concept in the preamble is emphatically anti-imperialist.[184] It holds that the equal rights of all

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[180] U.N. Charter (Preamble).

[181] *See id.*

[182] *Id.*

[183] *See* President Ronald Reagan, *Promoting Democracy and Peace* (June 8, 1982), where at Westminster, President Reagan called on the UK Parliament to help coordinate with the United States a broad public-private effort "to foster the infrastructure of democracy – the system of a free press, unions, political parties, universities – which allows a people to choose their own way, their own culture, to reconcile their own differences through peaceful means." *See also,* President George H.W. Bush, *State of the Union* address, January 29, 1991, calling for "a new world order – where diverse nations are drawn together in common cause, to achieve the universal aspirations of mankind: peace and security, freedom and the rule of law;" Koh, *supra* note 4, at 1498-99.

[184] U.N. Charter preamble, *supra* note 179.

nations must be respected. This is a reflection of the U.S. antipathy to the monopoly and exploitation of colonialism. The fifth keynote in the Charter preamble refers to the obligation to respect international law based not only on treaty commitments, but also on "other sources of international law."[185] The long tradition the United States has in the development of international law including the U.N. Charter makes this another critical value for U.S. foreign relations interests. The final point in the preamble of the Charter contains a deeply rooted expectation of progress, improved standards of living, and enhanced domains of freedom.[186] The idea of economic progress is essentially a New Deal idea. However, it has evolved and has a place in diverse socio-economic perspectives.

These keynote principles are a more fleshed-out expression of the values embodied in the Four Freedoms of the Atlantic Charter. In this sense they represent the central values which should animate and inform the content and process of U.S. foreign policy interests. There is no necessary incompatibility with U.S. national interests and those of international law. Modern international law is to a very large extent, a reflection of American values, an outward expression of its most cherished beliefs.

The interplay between problems and values which require some form of legal guidance and regulation requires that we have a view of international law that is relevant and comprehensive and provides us with the tools of comprehension to sharpen the prospect of developing problem solutions. The late Myres McDougal suggested a concept of international law that is well suited to this task. According to McDougal

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[185] *Id.*

[186] *Id.*

> The conception of 'international law' as a body of rules regulating the interrelations of nation states is doubly myopic. Beyond the infirmities of its over-estimating of the potentialities of rules, it has infirmities in the scope of the activities it seeks to make subject to law. The activities of humankind in global community process today spill across the boundaries of nation-states in an ever accelerating and intensifying rate. The contemporary conception of 'transnational law' takes only a beginning account of the importance of individual human beings, and their multiplicitous associations and groupings, in these new, transnational activities. . . . An appropriate law extends, must be extended, to the whole global process of authoritative decision that guides and regulates human activities across nation-state boundaries.[187]

According to McDougal, Lasswell, and their associates, the core objectives of international law are the realization of the common interest of all of humanity. The common interest is understood as a public order for the promotion and defense of human dignity. The National Security Doctrine of both President Bush and President Obama make the human dignity common interest objective an important component of the objectives of U.S. foreign policy.[188] The challenge however, lies in the wisdom and efficacy of the tactics and the strategies that are used to further the common interest in universal dignity. If the United States takes up the challenge and leads in the progressive development of international law and the institutions necessary to implement it, this exceptional Republic will be stronger, more secure, and free from fear.

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[187] Myres S. McDougal, *Law & Peace*, 18 Denver Jo. Intl Law and Policy, 1 (1989).

[188] *See* Full Text: "The National Security Strategy of the United States" (2002), *available at* http://www.nytimes.com/2002/09/20/politics/20STEXT_FULL.html?pagewanted=all; NATIONAL SECURITY STRATEGY (Obama), *supra* note 170.