International Law Under the Constitution and Transnational Progressives

*By Vincent J. Vitkowsky**

The U.S. Constitution created the structure for a sovereign nation operating in an international system. It recognized the importance of international law, and left the content, interpretation, force and effect of international law to the three branches of the U.S. government.

Properly understood, the creation and use of international law is an exercise of sovereignty which can advance U.S. interests and national security. It is a serious undertaking of importance to vital issues. How is this traditional conception affected by the activities of "transnational progressives," who, according to some, place a greater premium on norms found in customary international law?

This article proceeds from the analytical principle that international law is subordinate to the Constitution. This construct has been described as the "Internal/Constitutionalist narrative." It is in contrast to the "External/Internationalist narrative," which would treat external public international law, tribunals and sources as the controlling forces, and the "Transnational/Intersystemic narrative," which would look to multiple, interactive systems of law to guide interpretation and application of international law.[1] The Internal/Constitutional narrative is the only one that courts and government officials can seriously embrace. It was the construct used by the U.S. Supreme Court in the most important recent case on international law, *Medillin v. Texas*,[2] and used by the parties and the U.S., as amicus curiae, to brief that case.[3] It is worth observing, however, that unlike most courts and government officials, theorists of international law—chiefly professors and advocates in non-governmental organizations—tend to accept and promote the other narratives.

The Constitution

Only two constitutional provisions speak directly to the status of international law. The first is the Supremacy Clause,[4] which addresses treaties. It provides as follows:

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

The second reference to international law appears in the Define and Punish Clause,[5] which gives Congress the power to "define and punish Piracies and Felonies committed on the high seas, and Offences against the Law of Nations." The Law of Nations was the Founding-era term for what, in part, is known today as customary international law.

Treaties

The species of international law with the greatest force and effect is created by treaties, which are, in essence, contracts between sovereigns. When the U.S. enters into a treaty, negotiated by the President and ratified by two-thirds of the Senate, it makes commitments and undertakes obligations to the other signatory nations. Treaties can include agreements about adjudication of disputes concerning their interpretation and application.

Treaties are subject to limitations. Michael Stokes Paulsen has argued, for example, that the United States cannot agree to undertakings which are inconsistent with the Constitution.[6] This is typically avoided by attaching reservations, understandings, and declarations to ratification.[7] Next, perhaps the most important limitation is the system of checks and balances established by the Framers. The power to interpret and apply all international law, including treaties, is shared by the three branches of government, as distributed by the Constitution. To summarize Paulsen's comprehensive analysis, the President has responsibility to interpret and apply international law consistent with his powers to serve as Commander-in-Chief and to conduct the nation's foreign policy. Congress has responsibility pursuant to its powers to declare war, and to define and punish offenses against the law of nations by enacting legislation (or not enacting legislation) for carrying treaties into execution. The judiciary has responsibility to adjudicate cases presenting questions about treaties and customary international law which are properly before them.[8]

There is a crucial distinction between international commitments made by a sovereign, and legal obligations that are enforceable as a matter of binding federal law in domestic U.S. courts. All treaties give rise to international commitments, but not all give rise to legal obligations that may be enforced in U.S. domestic courts. The distinction turns on whether a treaty is "self-executing." A self-executing treaty is one that, upon Senate ratification, has automatic domestic effect as federal law. A "non-self-executing" treaty only has domestic effect as federal law upon the passage of further implementing legislation. Even self-executing treaties are understood not to create private rights or provide for a private cause of action in domestic courts, in the absence of express language to the contrary.

The U.S. Supreme Court clearly applied these principles in the recent case of *Medillin v. Texas*.[9] That case followed an International Court of Justice ("ICJ") judgment in a matter known as *Case Concerning Avena and other Mexican Nationals* (*Mex. v. U.S.*) ("*Avena*").[10] The ICJ had held that 51 Mexican nationals who had been convicted of crimes and sentenced, including Jose Medillin, were entitled to review and reconsideration of their state court convictions and sentences because they had not been informed of their rights to notify the

** Vincent J. Vitkowsky is a partner at Edwards Angell Palmer & Dodge LLP and an Adjunct Fellow at the Center for Law and Counterterrorism of the Foundation for the Defense of Democracies.*

Mexican consulate of their detention. The U.S. Supreme Court held that the ICJ judgment in *Avena* would not supersede state procedural rules in criminal cases, even though the President had issued a Memorandum directing the states to give effect to the ICJ judgment.

Jose Medillin was a Mexican national who had lived in the U.S. since preschool. He became a member of the "Black and Whites" gang and was convicted in the brutal gang rape and murder of two girls, ages 14 and 16, and sentenced to death. He was not informed of his right, as a Mexican national, to notify the Mexican consulate of his detention. This right arises under a treaty the U.S. has entered into known as the Vienna Convention on Consular Relations ("Vienna Convention"),[11] and the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention ("Optional Protocol").[12] Under the U.N. Optional Protocol, resolution of disputes concerning the interpretation or application of the Vienna Convention is subject to the compulsory jurisdiction of the ICJ. The U.S. has withdrawn from the Optional Protocol, but had not done so at the time that the ICJ issued the judgment in *Avena*. The ICJ is the principal judicial organ of the United Nations, and was established pursuant to the United Nations Charter ("U.N. Charter"), which itself is a treaty to which the U.S. is a signatory.[13]

In response to the ICJ judgment in *Avena*, President George W. Bush determined, through a Memorandum to the Attorney General (Feb. 28, 2005), that the U.S. would "discharge its international obligations . . . by having state courts give effect to the [ICJ] decision."

The State of Texas Court of Criminal Appeals declined to review and reconsider Medillin's conviction. It dismissed his writ of habeus corpus, as an abuse of the writ, in view of Medillin's failure to raise his Vienna Convention claim in a timely manner under Texas procedural default rules.

In *Medillin v. Texas*, the U.S. Supreme Court held that neither the ICJ judgment nor the Presidential Memorandum created federal law that could be enforced in U.S. domestic courts to preempt the procedural rules of Texas relating to habeus corpus petitions. In reaching this holding, the Court concluded that the U.N. Charter, the Vienna Convention, and the Optional Protocol did not create self-executing obligations effective in U.S. courts. It reached that conclusion based on analysis of the text of the treaties, the executive's construction (notwithstanding the Presidential Memorandum, as Chief Justice Roberts acknowledged in his majority opinion in *Medillin*, the U.S. has unfailingly taken the position that the Vienna Convention and Optional Protocol did not, in themselves, create domestically enforceable federal law), and the post-ratification understanding and practice of other signatories.

As for the Presidential Memorandum, the Court held that in the absence of implementing legislation by Congress, the President had no authority to turn a non-self executing treaty into a self-executing treaty. It further held that the President did not have the independent power to order Texas to comply by virtue of his foreign affairs authority to resolve disputes with foreign nations.

The import of *Medillin v. Texas* is clear. Unless a treaty or its implementing legislation expressly provides to the contrary, a judgment of the ICJ—or any other international tribunal—has no binding legal effect in the U.S., and the President is without power to change that result.

Another important limitation on treaties is that Congress can always supersede or override them by enacting subsequent inconsistent legislation. This is known as the "last-in-time" rule. There is no dispute that a subsequent congressional enactment trumps a treaty. There is also a serious view that the structure of the Supremacy Clause—which mentions the Constitution, and "Laws of the United States which shall be made in pursuance thereof," i.e., statutes, before Treaties—creates a hierarchy in which all statutes, even those enacted prior to a treaty, will control over a treaty.[14]

A final limitation, which is not universally accepted, is that pursuant to his foreign affairs power, the President may interpret, suspend, or repudiate a treaty in whole or in part.[15]

The Law of Nations (Customary International Law)

The second potential source of international law, known today as customary international law, is in essence the common laws of nations. Customary international law is defined as: (a) a widespread and uniform practice among nations that has ripened into a customary norm; (b) that nations follow out of a sense of legal obligation.

For a norm to be considered customary international law, it must have the widespread (but not necessarily universal) support of nations concerned with the issue it addresses, and must have continued long enough to give rise to at least an inference of recognition and acquiescence. Interim norms become customary international law once a large enough number of nations having an interest in them act in accordance with them. The assent of a nation is inferred by silence, except as to "consistent objectors."

There is a special category of customary international law, *jus cogens* or "compelling law," which is considered to consist of peremptory norms. The argument is that no nation is permitted to act contrary to those norms, whether or not it has acquiesced.

Although there is general acceptance of the concept of customary international law, beyond *jus cogens*, there is very little agreement on its content. Some argue that many malleable and questionable concepts should be considered customary international law binding in U.S. courts. For the most part, such arguments have been rejected.

In a case addressing customary international law known as *The Paquete Habana*,[16] the U.S. Supreme Court began a passage with the phrase "international law is part of our law." This is often embraced and quoted by progressive advocates. But the key portions of the passage limit the opening phrase, by explaining: "[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."[17]

In practice, customary international law is most relevant in U.S. domestic courts in cases brought under the Alien Tort Statute,[18] which contains another Founding-era reference to the Law of Nations. It provides as follows:

Alien's action for tort

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

Since 1980, U.S. courts have permitted this statute to be used by non-U.S. citizens to sue private individuals and corporations for violations of international law. The U.S. Supreme Court has interpreted the statute only once, in *Sosa v. Alvarez-Machain*.[19] That case narrowed and refined the range of principles that might constitute customary international law affording a private cause of action under the ATS. Although it left open the possibility that new principles of customary international law might emerge, the Supreme Court took pains to urge judicial restraint, and gave strong indications that lower courts should limit rather than increase the emergence of new principles.[20]

"International Law" and "Transnational Progressivism"

Within its proper sphere, international law is a positive instrument that can address areas of common concern among nations. Notably, as Michael Chertoff has observed, through international law "states assume reciprocal obligations to contain transnational threats emerging from within their borders so as to prevent them from infringing on the peace and safety of fellow states around the world."[21]

But tensions arise when "international law" is inaccurately described to include something other than ratified, implemented treaties, or the very few undeniably accepted principles of customary international law. Witness, for example, the failure of many countries to broadly protect free speech. Some speech that the U.S. protects under the 1st Amendment is considered by much of the rest of the world to be "heresy" or "blasphemy against Islam" and thus a violation of international human rights law.

Apart from application of customary international law, some support several proposed treaties that would present significant incursions into traditional notions of sovereignty and would raise federalism issues. In May 2009, the Obama Administration sought Senate advice and consent on ratification of the United Nations Convention on the Law of the Sea ("LOST") and the United Nations Convention for the Elimination of All Forms of Discrimination Against Women ("CEDAW"). LOST mandates arbitration of maritime disputes before an international tribunal. CEDAW implicates gender quotas, pay standards, and parental leave, rules not presently embraced by domestic law. It also seems likely that the Obama Administration will seek ratification of the United Nations Convention on the Rights of the Child, which would affect state discretion on issues such as juvenile justice, education, welfare, adoption, and custody and visitation.

One key arena for conflicts concerning the interpretation and application of international law is litigation brought into the U.S. domestic courts. Advocates calling for application of an international norm will often (1) argue that treaty obligations broader than those undertaken upon ratification and execution are enforceable as a matter of U.S. domestic law; and (2) articulate the existence of broad and disputed principles of customary international law.[22] At times, courts are asked to (1) ignore U.S. reservations in treaty ratifications; (2) give domestic effect, as a matter of customary international law, to an alleged "consensus" of other signatories to a treaty that is contrary to U.S. reservations; and (3) grant the U.S. government powers on social and economic issues that, under the federal system in the U.S., historically reside with the states.

Endnotes

1 These narratives have been presented in Margaret E. McGuinness, *Three Narratives of Medillin v. Texas*, 31 Suffolk Transnat'l L. Rev. 227 (2008).

2 552 U.S. 491 (2008).

3 McGuinness, *supra* note 1, at 235.

4 U.S. Const. art. VI, cl. 2.

5 U.S. Const. art. I, § 8, cl. 10.

6 Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 111 Yale L.J. 1174, 1785-1788 (2009).

7 For example, with respect to interrogation of captured terrorists, the most relevant international law is arguably a treaty, the 1984 U.N. Convention against Torture and Cruel, Inhuman and Degrading Treatment or Punishment. The U.S. Senate ratified it in 1994, with a reservation. It limited the treaty's prohibition against cruel, inhuman, and degrading treatment to what was already required under U.S. law by the 5th, 8th and 14th Amendments. (There are two views on what this means. One view is that cruel, inhuman, and degrading treatment restrictions do not apply to aliens captured and held in foreign countries. As to those, only the torture prohibition applies. The other view is that the reservation relates only to the definition of prohibited treatment but not to the location of the suspects.) For the purpose of criminal proceedings, the 5th, 8th and 14th Amendments bar both coerced confessions and cruel and unusual punishment. But in other contexts, there is scope for flexibility in interrogation, based on the purpose of the government action. In *Rochin v. California*, 342 U.S. 165 (1952), the U.S. Supreme Court set the test: whether the method used "shocks the conscience," considering all the circumstances, including the importance of the information sought. That is the controlling standard.

8 Paulsen, *supra* note 6, at 1816-1834.

9 552 U.S. 491 (2008).

10 2004 I.C.J. 12 (Judgment of Mar. 31).

11 Apr. 24, 1963, [1970] 21 U.S.T. 77, T.I.A.S. No. 6820.

12 Apr. 24, 1963, [1970] 21 U.S.T. 325, T.I.A.S. No. 6820.

13 Art. 92, 59 Stat. 1051, T.S. 993 (1945).

14 *See*, *e.g.*, Akhil Reed Amar, America's Constitution: A Biography 302-307 (2005).

15 Paulsen, *supra* note 6, at 1789-1792.

16 175 U.S. 677 (1900).

17 *Id*. at 700.

18 28 U.S.C. § 1350 (2000).

19 542 U.S. 692 (2004).

20 For a more detailed review and analysis of the Alien Tort Statute, *Sosa*, and some remaining open issues, *see* Vincent J. Vitkowsky, *Understanding the Newly-Refined Role of Customary International Law in U.S. Courts*, 7(1) Engage 111 (2006).

21 Michael Chertoff, *The Responsibility To Contain*, 88(1) Foreign Aff. (January/February 2009).

22 Transnational progressives sometimes argue that the Take Care Clause, U.S. Const. art. II, § 3, which gives the President responsibility to "take Care that the Laws be faithfully executed," can give rise to international obligations. This argument presupposes its conclusion—that certain purported norms, mislabeled as "international law," create international obligations or federal law which are enforceable in U.S. courts.