

## WHAT IS AN INTERNATIONAL RULE OF LAW?

DENNIS JACOBS\*

A panel at the 2006 Federalist Society Student Symposium explored a controversial and open-ended topic: the proper role and scope of an “International Rule of Law.” The panelists were challenged to answer two questions: (1) In what sectors do international legal norms ideally operate? and (2) How much fidelity do American actors owe international norms in these various sectors of international life?

The United States is in the world and of the world, and is—very fortunately—engaged internationally in countless ways, most of which are not subject to debate. Many areas of international law uncontroversially add to domestic prosperity and international order. International law is not all about human rights, conflict, and the overlaying of international consensus on domestic law. Rather, international law is composed for the most part of well-developed, highly ramified systems of authority and order that facilitate life among nations: Business is transacted (thanks in part to arbitration structures and free trade zones), goods are carried, ships are given passage, piracy is suppressed, ambassadors are given immunity, criminals are extradited, airplanes are flown (thanks to uniform standards promulgated by the International Civil Aviation Organization<sup>1</sup>), funds are wired, and tariffs and duties are adjusted and negotiated. Banking structures are also international. These areas of international business reflect a common understanding of law that operates throughout most of the world.

Here in the United States, we find common ground by consulting the Constitution, which reigns supreme. Some relevant clauses include:

“Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations; To declare War . . . and make Rules

---

\* Chief Judge, United States Court of Appeals for the Second Circuit.

1. See generally ICAO's Aims, [http://www.icao.int/cgi/goto\\_m.pl?icao/en/aimstext.htm#CNS](http://www.icao.int/cgi/goto_m.pl?icao/en/aimstext.htm#CNS) (last visited Oct. 25, 2006).

concerning Captures on Land and Water; To raise and support Armies . . . [and] To provide and maintain a Navy."<sup>2</sup>

"The . . . Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."<sup>3</sup>

"No State shall enter into any Treaty, [or] Alliance."<sup>4</sup>

"The executive Power shall be vested in a President."<sup>5</sup>

"The President shall be Commander in Chief of the Army and Navy."<sup>6</sup>

"[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he . . . shall appoint Ambassadors,"<sup>7</sup> and receive them.<sup>8</sup>

"[The President] shall take Care that the Laws be faithfully executed."<sup>9</sup>

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority."<sup>10</sup>

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land."<sup>11</sup>

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>12</sup>

Though the details of how these clauses are to be interpreted are not always clear, there is at least a broad consensus on what the relevant law is.

However, what constitutes international law is subject to dispute. Although lawyers feel as though they have exclusive rights to control this debate, the most powerful movers of "international law" may be ordinary people leading their every-

2. U.S. CONST. art. I, § 8, cl. 10–13.

3. *Id.* § 9, cl. 2.

4. *Id.* § 10, cl. 1.

5. *Id.* art. II, § 1, cl. 1.

6. *Id.* § 2, cl. 1.

7. U.S. CONST. art. II, § 2, cl. 2.

8. *Id.* § 3 ("[H]e shall receive Ambassadors and other public Ministers.").

9. *Id.*

10. *Id.* art. III, § 2, cl. 1.

11. *Id.* art. VI, cl. 2.

12. U.S. CONST. amend. X.

day lives. Consider what goes on around the site of this year's symposium, Columbia University, in the City of New York. In many of the neighborhoods and boroughs of this city can be found the most hopeful confirmation that diverse peoples can live in peace. Here, nationality and sectarianism lose their militant and divisive force and are sublimated into fashion, culture, cuisine, community service, and the general striving and clamor of American life and commerce. One theory about what composes an "international rule of law" is that these cultural activities create linkages that bypass national and governmental designations. Whatever the UN has done to connect the people of the Earth, MTV has probably done more.

Nevertheless, lawyers are very good at protecting turf—subject areas that are under their exclusive control and that no one else understands very well. Unsurprisingly, these lawyer-created subject areas produce some of the most incendiary conflicts in the current study of international law. Consider, for example, "customary international law," an ill-defined (or inconsistently defined) concept. The Second Circuit "resort[s] to customary international law . . . only 'where there is no treaty and no controlling executive or legislative act or judicial decision' that speaks to the issue,"<sup>13</sup> and will only vest a customary international norm with the force of law if "States universally abide by, or accede to [it], out of a sense of legal obligation and mutual concern" as demonstrated by "the usage and practice of States—as opposed to judicial decisions or the works of scholars."<sup>14</sup> However, more expansive approaches both to the sources and force of customary norms may apply for one reason or another. Some would expand the definition of custom to include nonbinding United Nations resolutions, while others might stretch the definition further to include treaties.

Two areas of tension arise when one considers the nature and authority of customary international law and other international norms. First, difficulties materialize where an international norm is applied to a country that has not expressed its assent to that norm. Should such a norm be respected because of its potential to bring "law and order" (and perhaps even "peace") to the international realm? Or need one investigate the source of the norm and its relation to American interests?

---

13. *Oliva v. U.S. Dep't of Justice*, 433 F.3d 229, 233 (2d Cir. 2005) (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

14. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 248, 250 (2d Cir. 2003).

Second, what force should one attach to vague norms, identified by academics and non-governmental organizations rather than by heads of state and legislatures?

The panelists provided insight into all of the above questions, and to the particular responsibilities of lawyers (and lawyers-in-training) in answering them.