

THE COMPARATIVE DISADVANTAGE OF CUSTOMARY INTERNATIONAL LAW

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International law is as important a topic as any to our future legal regime. International law increasingly infiltrates the domestic world. Some United States Supreme Court justices appear to use international law, including unratified customary international law,¹ as a source upon which to draw in defining the category of citizens constitutionally subject to the death penalty.² Other scholars advocate treating customary international law as federal law that constrains officials and even displaces conflicting federal legislation.³ Under such a regime, in-

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1. See, e.g., Kenneth Anderson, *Foreign Law and the U.S. Constitution*, 131 POL'Y REV. 33, 36 (2005) (“[T]he [*Roper v. Simmons*, 543 U.S. 551 (2005)] Court nowhere cites a treaty or convention which the United States actually *has* ratified, assented to, and drawn into its domestic law without relevant reservation. Rather, it has chosen to cite treaties that the United States . . . deliberately refused to join or has joined only with reservations on the very point at issue Indeed, the Court seems functionally to have treated all these unratified treaties and other materials as though its task were to pronounce on the content of customary international law . . . and then require its application in the United States. The Court nowhere calls it customary law—because, one hopes the Court understands, it is *not*—but the process of reasoning toward a supposed consensus on the law’s content feels (at least to this international lawyer) very much like it—provided one accepts, that is, a very contemporary, very expansive, and frankly dubious view of how customary law is discerned.”).

2. See, e.g., Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1, 2–3 (2006) (“In *Roper v. Simmons*, six members of the Supreme Court agreed that international law is relevant to determination of ‘society’s evolving standards of decency’ under the Eighth Amendment [I]n extrajudicial speeches and writings, Justices Ginsburg, Breyer, and O’Connor, and at one point the late Chief Justice Rehnquist, all indicated that consideration of international and foreign law is important to the jurisprudence of the modern Supreme Court.”).

3. See, e.g., Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

ternational rules might then even bind the United States in the war on terror.⁴

What makes the domestic application of some customary international norms particularly controversial is that Congress and the President have not affirmatively chosen to give them domestic effect. This unprocessed international law, or “raw international law,” is distinguished from international law expressly adopted by the political branches, such as self-executing treaties. Pragmatically, one should give domestic effect to raw international law if it is likely to produce norms better than those produced by our own political processes. The rule of international law is certainly not to be preferred if it destabilizes a better American rule of law.

To evaluate the quality of raw international law, one could simply cite instances where American law and professed customary international law diverge and then argue that the American law is better. American law, for example, permits the Executive to detain enemy combatants associated with al Qaeda who have not been convicted of specific crimes.⁵ Many international lawyers assert that customary international law does not allow for such detention.⁶ Yet, determining which law is normatively better might not be very productive. People who agree on abstractions like fairness often disagree on particular norms like these. One might instead assess whether the process of making raw international law is better than the process of making American law, which is based on domestic legal processes about which there is a consensus. To do so, one must

4. Thus, international rules might prevent the United States from enacting legislation such as the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (responding to the attacks of September 11, 2001).

5. See *Khalid v. Bush*, 355 F. Supp. 2d 311, 318–19 (D.D.C. 2005) (“[W]hen Congress, through the [Authorization for Use of Military Force], authorized the President ‘to use all necessary and appropriate force against those . . . persons he determines planned, authorized, committed, or aided the terrorist attacks [of 9/11]’ ‘to prevent any future acts of international terrorism against the United States by such . . . persons[.]’ . . . it, in effect, gave the President the power to capture and detain those who the military determined were either responsible for the 9/11 attacks or posed a threat of future terrorist attacks. Indeed, the President’s war powers could not be reasonably interpreted otherwise.”).

6. See, e.g., Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 757 (2002) (“Finally, international law does not allow the holding of detainees indefinitely until the Administration deems it safe to release them.”).

compare international law with American law—first as it affects Americans and then as it affects the wider world.

Democracy is one process that commands consensus support for norm creation. Although a full analysis of why democracy is likely to reach good norms is beyond the scope of this Article, two arguments are worth noting. If individuals support norms when personal benefits exceed personal costs, then norms adopted by a majority are likely to be beneficial overall. Moreover, collective judgments of diverse individuals are likely to be more accurate in assessing costs and benefits than judgments made by only a few.

A glaring problem with customary international law, the most important category of raw international law, is that it has a democratic deficit built into its very definition. To be customary international law, a principle must result “from a general and consistent practice of states followed by them from a sense of legal obligation.”⁷ This definition mentions only the “general and consistent practice of” nation-states without any reference to representative processes or to the welfare of citizens. Thus, by its very definition, customary international law neglects democratic decision making. In addition to this theoretical problem, customary international law has at least five different democratic deficits that arise in practice.

First, nations do not have to assent affirmatively to the creation of a principle of customary international law. Instead, nations are considered to have consented to a principle if they simply failed to object.⁸ This measure of assent compares unfavorably with the requirements of domestic democracy, which assure both deliberation and accountability. Domestic political actors cannot create norms by inaction but instead must affirmatively embrace a practice to make it law.

Second, undemocratic, even totalitarian, nations wield influence on international law. This influence is most obvious in multilateral human rights treaties, like the U.N. Convention on

7. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987).

8. *See id.* § 102 cmt. d (“Although customary law may be built by the acquiescence as well as by the actions of states . . . and become generally binding on all states, in principle a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures.”).

the Rights of the Child,⁹ which are often asserted as a basis for customary international law even if not ratified by the United States.¹⁰ Totalitarian nations like the Soviet Union and communist China participated in the negotiations of these treaties. One can hardly be confident that the same provisions would have emerged absent the influence of those “evil empire[s].”¹¹ Consider this analogy: Should the United States give domestic effect to provisions of treaties that it did not ratify, but that instead were approved by Nazi Germany and other Axis powers?

Third, many treaties and other international declarations are merely empty promises if nations do not actually enforce them. Many nations flout international norms imposed by treaty while others often fail to give them domestic effect. In contrast, Congress expects that the norms it codifies into domestic law will be enforced, providing evidence that those norms are sincerely embraced.¹²

Fourth, it is often unclear what the customary international legal norm is, or if one even exists. Provisions in negotiated agreements are at least documented. Many, if not most, principles of customary international law do not rest on a canonical text like domestic statutes do. Someone must assess how widespread a practice is and whether the practice reflects a legal norm. Those responsible for these determinations are primarily international law professors. Although law professors have many virtues, they are most likely not representative of their fellow citizens. A recent study found that elite law professors in the United States were extremely unrepresentative in political ideology, leaning Democratic over Republican by a ratio of

9. See United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 44 (adopted by the United Nations General Assembly without a vote).

10. See, e.g., Shaleeta Washington, Note, *Transcending Rhetoric: Redressing Discrimination In Education In Bulgaria and Israel Through Affirmative Action*, 23 PENN ST. INT'L L. REV. 969, 980 (2005) (“The overwhelming acceptance of . . . treaties [like the Convention on the Rights of the Child] and the provisions concerning the enjoyment of the right to education without discrimination contained therein provide evidence that the right to education has become a part of customary international law.”).

11. President Ronald Reagan, Remarks at the Annual Convention of the National Association of Evangelicals (Mar. 8, 1983) (transcript available at <http://www.reagan.utexas.edu/archives/speeches/1983/30883b.htm>).

12. See, e.g., U.S. CONST. art. VI, cl. 2 (“[A]ll 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 . . .”).

over five to one.¹³ An ideologically skewed group will likely choose ideologically skewed norms.

Finally, social science unsurprisingly suggests that average Americans have a poorer understanding of what happens in Geneva and other foreign places than of what happens in Washington, D.C.¹⁴ Moreover, government will be more accountable to Americans if only Americans are responsible for setting the law. Following customary international law makes government less transparent and accountable; it also permits interest groups and elites greater influence over the law because they can operate more effectively outside the United States than the ordinary citizen can.

Thus, international law has many democratic deficits. Domestic democracy is far from perfect, but elections, deliberation, and the scrutiny of public officials provide substantial assurance that norms beneficial for Americans will develop over time.

Defenders of international law sometimes note that the American legal system makes use of undemocratic norms, like custom and the common law. But international law simply does not possess the virtues of domestic custom or the common law. For example, the notion behind efficient custom is that individuals interacting reciprocally and repeatedly will adopt norms that maximize their joint surpluses.¹⁵ Because nations rather than people create customary international law, it is not well designed to maximize the welfare of people.¹⁶

Moreover, customary international law is not likely to generate efficient norms even for nations. Efficient norms are likely to occur when the groups generating the norms are small in

13. See John O. McGinnis, Matthew A. Schwartz & Benjamin Tisdell, *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO L.J. 1167, 1170 (2005) ("The contributions of politically active law professors are overwhelmingly Democratic: 81% of law faculty members in the study who make political contributions contribute wholly or predominantly to Democrats, while 15% contribute wholly or predominantly to Republicans.").

14. See John O. McGinnis and Mark Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 558 (2000).

15. See F.A. HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* 13 (W.W. Bartley III ed., 1989) ("For those now living within the extended order gain from . . . applying, in their interactions, rules of the extended order—such as those of several property and contract—instead of the rules of solidarity and altruism.").

16. See Eugene Kontorovich, *Inefficient Customs in International Law*, 48 WM. & MARY L. REV. (forthcoming 2006).

number, homogeneous in size, and where their members act reciprocally (that is, they take turns playing the relevant roles that the norms seek to regulate).¹⁷ As Eugene Kontorovich has shown, these conditions are rarely satisfied for international custom.¹⁸ The approximately 200 nations that exist today have different interests defined by geographic position, level of development, and religious identification. Many never interact at all, let alone reciprocally.¹⁹

Nor can customary international law easily be defended as efficient by analogy to the common law.²⁰ Again, there is the problem that nations, not people, act in the international realm. Moreover, the common law moves toward efficiency as a by-product of the strategies that litigants choose. Customary international law, however, is not sufficiently tested in the crucible of litigation to make that theory plausible.²¹

The difficulty of connecting international law to a process for generating beneficial norms militates against domestic enforcement of international law unless endorsed by the political branches. Given that customary international law lacks the procedural guarantees of the ordinary democratic process, it should not be used to construe the Constitution and invalidate the results of the American democratic process.²² Nor should customary international law be used to impose restraints on domestic officials. Many scholars believe that customary international law should be considered federal law having domestic force, at least absent new federal legislation or perhaps express action by the President.²³ In their view, customary international law can *at a minimum* bind the states and federal officials below the President. This doctrine, however, should also be rejected.

17. *Id.*

18. *Id.*

19. *Id.*

20. See John O. McGinnis, *The Appropriate Hierarchy of Global Multilateralism and Customary International Law: The Example of the WTO*, 44 VA. J. INT'L L. 229, 248–49 (2003).

21. *Id.*

22. See John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303, 308 (2006).

23. Scholars have expressed a wide variety of views on the domestic effect of customary international law, and the resulting literature is too complicated to discuss here. For a discussion of the complexity surrounding this topic, see John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. (forthcoming 2007).

We should not generally circumscribe the otherwise lawful actions of federal actors or displace state law unless a norm goes through a democratic process, which provides a far stronger guarantee of quality than does customary international law.²⁴

Some scholars have argued that following international law may improve a nation's welfare because only international law can provide a solution to the tragedy of the commons where the spillovers of one nation affect other nations.²⁵ For instance, it may be best for all nations to refrain from overfishing a common body of water because in the long run that restraint will produce more fish for all. This, however, is an argument for international agreements, not for customary international law. The political branches may decide to enter into treaties or even to adopt customary international law, if they believe it would solve coordination problems among nations. Adoption by the political branches would provide some evidence that the solutions provided by international law are actually good ones.

Finally, one might argue that a nation should follow raw international law to take into account the interests of foreign nationals. But it seems almost axiomatic that the touchstone of the American regime should be the welfare of Americans. But even assuming that the United States should take a more encompassing view of human welfare, American law may actually be better than international law at protecting the interests of citizens around the world.

First, not all of the activities purportedly covered by modern customary international law generate substantial negative spillovers from one nation to another. For example, most of the American government's decisions about human rights directly affect only those who have subjected themselves to the jurisdiction of the United States. Yet, the United States' power to determine its own law in this regard has benefits for foreigners. One benefit is that some individuals may choose to move to America, as millions do each decade, to take advantage of its particular bundle of rights and responsibilities. Moreover, all

24. McGinnis, *supra* note 22, at 308.

25. See, e.g., Mortimer Sellers, *Republican Principles in International Law*, 11 CONN. J. INT'L L. 403, 419 (1996) ("[I]nternational law has three main purposes: first, to protect each nation's sovereignty and self-determination against external and internal threats; second, to protect the human rights of all citizens against their own people's excessive social unity or democratic enthusiasm; and finally, to advance the common good of all nations, where collective action is necessary.").

democratic nations may evaluate American rights and embrace as many as are good for them. If the United States had followed the prevailing norms at the time of the Declaration of Independence, it would never have declared the truths about the nature of man and government that have become the foundations of democratic processes around the world. By forcing a convergence of domestic law to some international standard, customary international law may preclude similar gifts that American exceptionalism might still deliver to the world.

Even in activities where there are spillovers, such as law on the use of force, American law is probably better than international law. The United States is the world's great power, sometimes called the global hegemon in international relations theory.²⁶ It stands to gain the lion's share of resources from the peace and prosperity of the world. Its political process has incentives to provide laws that contribute to peace and prosperity, such as appropriate use of force. Moreover, as a hegemon composed of immigrants who remain concerned about the welfare of their former nations, America affords citizens from all over the world some virtual representation in its political process. These guarantees of beneficence for foreigners are surely imperfect, but they seem better than those provided by customary international law. Thus, by insisting that United States courts follow American law and not raw international law, Americans serve both themselves and others around the globe. America helps the world most by remaining true to her own democratic genius.

26. See, e.g., Charles Krauthammer, *The Unipolar Moment*, 70 FOREIGN AFF., Winter 1990-91, at 23, 23-33; Michael Mastanduno, *Preserving the Unipolar Moment: Realist Theories and U.S. Grand Strategies after the Cold War*, 21 INT'L SEC., Spring 1997, at 49, 49-88.