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FOREWORD

INTERNATIONAL LAW IN THE UNITED STATES LEGAL SYSTEM: OBSERVANCE, APPLICATION, AND ENFORCEMENT

Beth Van Schaack*

Since the founding of our republic, the United States has been an active participant in international law making, and our Supreme Court has a long history of identifying and enforcing international law.¹ Even so, starting with the Court's 2002 Term, the quality and quantity of Supreme Court cases touching on international law has significantly raised the visibility of this tradition on the bench, in the academy, in the press, and among members of the general public.² The fact

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1. See generally Ariel N. Lavinbuk, Note, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court's Docket*, 114 YALE L.J. 855 (2005) (undertaking "docket analysis" to identify early judicial involvement in foreign affairs); Harold Hongju Koh, *Agora: The United States Constitution and International Law: International Law as Part of Our Law*, 98 A.J.I.L. 43 (2004) (discussing the long history of international adjudication).

2. See, e.g., *Roper v. Simmons*, 125 S. Ct. 1183 (2005); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Olympic Airways v. Husai*, 540 U.S. 644 (2004); *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *Rasul v. Bush*, 542 U.S. 466 (2004), *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003); *Atkins v. Virginia*, 536 U.S. 304 (2002). See generally Jordan Paust, *International Law before the Supreme Court: A Mixed Record of Recognition*, 45 SANTA CLARA L. REV. 829 (2005) (discussing cases from the Court's most recent Term). For a discussion of the October 2002 Term, see Janet Koven Levit, *Going Public with Transnational Law: The 2002-2003 Supreme Court Term*, 39 TULSA L.J. 155 (2003).

that we are a nation at war³ in part explains the proliferation and greater salience of international law on the domestic docket. The metaphorical “war on terror” and companion conventional wars in Afghanistan and Iraq have occasioned a series of important cases concerning the justiciability of international law norms and the limitations they place on executive power. Other recent international law cases are attributable to seemingly inexorable processes of globalization, which increasingly create opportunities for individuals hailing from different nations to come into contact with each other in commerce and in crime. Victims of international law violations can reach U.S. courthouses through various forms of migration, the work of transnational advocacy networks,⁴ and statutory avenues for redress.⁵ These endeavors coincide with legislative and judicial efforts to extend the extraterritorial reach of U.S. prescriptive and adjudicative jurisdiction. As Professor John Yoo of Boalt Hall School of Law emphasized in his symposium remarks, globalization guarantees increased opportunities for courts to consider the applicability and enforcement of international law.⁶ Thus, the topic of this *Santa Clara Law Review* Symposium, International Law in the United States Legal System: Observance, Application, and Enforcement, is a timely one.

It is also a vexing one. The nature of international law and the structure of our domestic system hinders the easy intersection of these two bodies of law. As a threshold issue, the sources of international law—treaties, custom, and general principles—differ significantly from their domestic coun-

3. See Louis Henkin, *War and Terrorism: Law or Metaphor*, 45 SANTA CLARA L. REV. 817 (2005) (advocating a narrow application of the term “war”).

4. See generally MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998).

5. The statutory framework includes the Alien Tort Statute, 28 U.S.C. § 1350 (2000) (allowing aliens to sue individuals responsible for international torts), the Torture Victim Protection Act, 28 U.S.C. § 1350 (2000) (allowing aliens or U.S. nationals to sue individuals responsible for torture or summary execution), the Anti-Terrorism Act of 1990, 18 U.S.C. § 2333 (2000) (allowing nationals or their representatives to sue individuals responsible for designated acts of terrorism), and the Foreign Sovereign Immunity Act, 28 U.S.C. § 1330 et seq. (2000) (allowing suits by aliens or U.S. nationals against states for various international law violations).

6. John Yoo, Remarks at International Law in the United States Legal System: Observance, Application, and Enforcement (Jan. 28, 2005) (transcript on file with the *Santa Clara Law Review*).

terparts, leading to challenges of identification and application. Treaties, for example, import their own doctrinal entourage, including specific rules of interpretation⁷ and principles of self-execution.⁸ The identification of customary international law—emerging as it does from the practice of states attributable to *opinio juris*⁹—and general principles of law¹⁰ invites a rigorous and unfamiliar comparative analysis of foreign government statements, actions, and legislation. The United States' constitutional and federated structure, with governmental power distributed between nested sovereigns and then further divided among branches of government through the separation of powers, further complicates the application and enforcement of international law in the U.S. legal system.

Combined, these factors give rise to a number of unanswered questions surrounding the chosen topic of this symposium. To what extent does international law—in treaty or customary form or as embodied within a judgment emanating from an international tribunal—provide a rule of decision directly enforceable by U.S. courts? When does international law provide litigants with private rights of action and when is implementing legislation required for justiciability? To what extent does international law constrain executive or legislative choices, or can the political branches override international law?¹¹ Where international law does not provide a rule of decision, what role should it play as an interpretive aid for constitutional or statutory analysis?¹² Our constitutional text, corpus of judicial precedent, and history of state practice pro-

7. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (entered into force Jan. 27, 1980).

8. See generally Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 A.J.I.L. 695 (1995) (discussing execution doctrines).

9. *Opinio juris* is a sense of legal obligation. See generally Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757 (2001).

10. See generally Christopher A. Ford, *Judicial Discretion in International Jurisprudence: Article 38(1)(C) and "General Principles Of Law,"* 5 DUKE J. COMP. & INT'L L. 35 (1994) (discussing theories for identifying general principles of law).

11. See generally Derek Jinks & David Sloss, *Is The President Bound By The Geneva Conventions?*, 90 CORNELL L. REV. 97 (2004).

12. See, e.g., *Roper v. Simmons*, 125 S. Ct. 1183 (2005); *Lawrence v. Texas*, 539 U.S. 558 (2003) (both citing foreign and international cases as persuasive authority).

vide only partial answers to these questions. And, as Judge Rosalyn Higgins of the International Court of Justice emphasized in her keynote address, the resolution of these issues may turn as much on cultural factors as it does on legal or doctrinal ones.¹³ In addition, there remain a series of normative questions on whether the application of international law advances U.S. interests. The issue is thus a multifaceted one, as ably demonstrated by the contributors to the symposium and this issue.

Long-time international law scholar Louis Henkin, professor emeritus at Columbia Law School, launches our issue with a compelling essay on the uses and misuses of metaphor in international law discourse.¹⁴ Echoing the symposium remarks of Dr. Bertrand Ramcharan, former Acting United Nations High Commissioner for Human Rights,¹⁵ Professor Henkin argues that the events of September 11th and subsequent exercises of preemptive self-defense have rendered the United Nations Charter neither obsolete nor defunct. Rather, Henkin argues, this framework can accommodate these new challenges to international peace and security to make certain that we remain a world community governed by law and the noble tradition of cooperative action envisioned and enabled by the Charter system. He calls on us all, and especially the younger generations such as those responsible for this symposium, to work collectively to ensure that the age of terrorism, inaugurated by the events of September 11th, does not eclipse the age of international human rights, launched at the close of World War II.

Professor Jordan Paust of the University of Houston Law Center next turns a critical gaze on six cases from the Supreme Court's most recent Term that touch on international law and foreign affairs.¹⁶ Starting with the "terrorism trilogy," Professor Paust demonstrates that the Court is not fully embracing international law as a direct source of authority, but is instead applying it tangentially and selectively. This

13. Rosalyn Higgins, Keynote Address at International Law in the United States Legal System: Observance, Application, and Enforcement (Jan. 28, 2005) (transcript on file with the *Santa Clara Law Review*).

14. Henkin, *supra* note 3.

15. Bertrand Ramcharan, Remarks at International Law in the United States Legal System: Observance, Application, and Enforcement (Jan. 28, 2005) (transcript on file with the *Santa Clara Law Review*).

16. Paust, *supra* note 2.

approach threatens uncertainty and inconsistency where courts domesticate particular international rules and principles ad hoc, independent from their fuller normative context. Thus, in *Hamdi v. Rumsfeld*,¹⁷ the Court determined that the so-called “September 11th Resolution”¹⁸ provided an implied congressional authorization for the detention of combatants during armed conflict—a foundational principle of the laws of war that allows for such detentions for the duration of hostilities to prevent combatants from returning to the theatre of war. The Court did not, however, invoke or apply other substantive rules of international humanitarian law related to, and indeed hinging on, this right of detention, such as the obligation provided by the Geneva Conventions to treat wartime detainees as prisoners of war until a “competent tribunal” has determined their status.¹⁹ Likewise, with respect to *Sosa v. Alvarez-Machain*,²⁰ Professor Paust laments that the Court, in considering whether the Alien Tort Statute²¹ enables victims of international human rights torts to sue for redress in U.S. courts, may have missed a far richer history of the types of international infractions recognized at our nation’s founding as giving rise to private rights of action.

Next, Professor Julian Ku of Hofstra University School of Law focuses specifically on the constitutional allocation of power to interpret customary international law—that unwritten species of international law premised on state practice and a belief in the existence of a legal obligation.²² He warns of the emergence of a structural conflict between the judicial and executive branches if the judiciary were to adopt an interpretation of customary international law that may be contradicted or repudiated by an alternative executive interpretation. Advancing the premise that the executive branch should play the definitive role in the interpretation, application, and execution of customary international law as part of its conduct of foreign affairs or the exercise of its more general Article II “executive power,” Professor Ku proposes sev-

17. 542 U.S. 507 (2004).

18. Authorization for Use of Military Force, Pub. L. No. 107-40 (2001).

19. Article 5, Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 134.

20. 542 U.S. 692 (2004).

21. 28 U.S.C. § 1350 (2000).

22. Julian G. Ku, *Structural Conflicts in the Interpretation of Customary International Law*, 45 SANTA CLARA L. REV. 857 (2005).

eral rules of deference to guide the judiciary's consideration of customary international law to avoid these structural conflicts. These rules would be applicable in the various contexts in which these conflicts might arise: where the courts employ customary international law to interpret a treaty or statute, or where they employ customary international law as a rule of decision, as in *Sosa*.

Professor Jenny Martinez of Stanford Law School focuses her contribution on the effect of international decisions in U.S. courts and situates the contemporary debate within the broader historical context of U.S. participation in international adjudication and arbitration.²³ Her contribution comes as the Supreme Court was considering the case of *Medellin v. Dretke*,²⁴ which concerned the question of whether and how U.S. courts are to give effect to a decision of the International Court of Justice ("ICJ") in a contentious case between the United States and Mexico.²⁵ In that case, the ICJ held that the rights of petitioner and fifty-one other Mexican nationals under the Vienna Convention on Consular Relations²⁶ were violated when they were tried and sentenced without being provided notice of their right to consular assistance as set forth in the binding treaty.²⁷ Professor Martinez recounts the iterative dialogue that has occurred through several cases over time between the ICJ and state and federal courts adjudicating claims brought under the Vienna Convention, as the ICJ became "increasingly blunt"²⁸ in its criticism of the United States' lack of adherence to the treaty and increasingly precise about the relief that is due. To complicate matters further, the executive branch recently interjected itself into this dialogue in the form of a memorandum from President George W. Bush directing courts, as a function of international comity, to give effect to the ICJ's decision with re-

23. Jenny S. Martinez, *Enforcing the Decisions of International Tribunals in the U.S. Legal System*, 45 SANTA CLARA L. REV. 877 (2005).

24. The Court recently concluded that *certiorari* was improvidently granted, because the petitioner may receive the relief he seeks through Texas state proceedings. *Medellin v. Dretke*, 125 S.Ct. 2088 (2005) (per curiam).

25. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31, 2004).

26. See Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, *ratified by the United States* Dec. 24, 1969, 21 U.S.T. 77, 596 U.N.T.S. 261.

27. *Avena*, 2004 I.C.J. at ¶106.

28. Martinez, *supra* note 23.

spect to the individuals named therein.²⁹ The memorandum occasioned a terse response from Texas state officials, who have argued that the memorandum exceeds the constitutional bounds of federal authority.³⁰ The dispute raises complex questions concerning the breadth of the president's power to determine how the nation will comply with its treaty obligations and the judgments of international courts, as well as his authority to command state governments to take certain actions to effect such compliance. Against this convoluted account of resistance and compliance, Professor Martinez emphasizes the rich history of U.S. courts' applying international law and acceding to international arbitration under less politically perilous circumstances. While it is tempting to focus on the high-profile wartime cases for guidance about the applicability and enforceability of international law in the domestic system, Professor Martinez notes that the highly charged political context in which these cases arise obscures a more routine and less controversial history of the use of international law in more quotidian commercial disputes. This history suggests that the enforcement by domestic courts of the decisions of international tribunals does not necessarily or indelibly impinge on sacrosanct prerogatives of state sovereignty.

Finally, Francisco Rivera, an Assistant Attorney with the Inter-American Court of Human Rights, provides a perspective from the Southern Cone and an institution with an uneasy relationship with the United States.³¹ Rivera describes

29. Memorandum for the Attorney General (Feb. 28, 2005), available at http://www.debevoise.com/publications/pdf/Annex2oftheBriefAmicusCuriaeoftheUnitedStatesinsupportofRespondentPresidentialDirective_v1.PDF (last visited May 9, 2005).

30. See, e.g., Hugh Dellios & Steve Mills, *Bush Administration Orders States to Review Cases of Mexicans on Death Row*, KAN. CITY STAR, Mar. 8, 2005 (recounting statement by Texas Attorney General), available at <http://www.kansascity.com/mld/kansascity/news/world/11084237.htm> (last visited May 9, 2005).

31. Francisco Rivera, *Inter-American Justice: Now Available in a U.S. Federal Court Near You*, 45 SANTA CLARA L. REV. 889 (2005). The Inter-American Court adjudicates claims brought against state parties to the American Convention on Human Rights that have accepted its jurisdiction. See Inter-American Court, *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/ser. L./V/II. 92, doc. 31 rev. 3, at 17 (1996). By contrast, the Inter-American Commission on Human Rights has a broader reach and can hear claims against state parties to the American Convention or the American Declaration on the Rights and Duties of Man. *Id.* at 25. The United States is a party

the interaction of the Inter-American human rights system with U.S. domestic courts adjudicating human rights claims under the Alien Tort Statute and the Torture Victim Protection Act. While this hemispheric “community of courts”³² may have concurrent jurisdiction over particular incidents or policies, the quality of redress may vary given differences in their direct accessibility to victims, the nature of respondent entities (and their ability to consider state versus individual or corporate responsibility), and the relief available. Indeed, as Rivera describes, many paradigmatic incidents of rights violations in the Southern Cone have given rise to cases in multiple fora, providing opportunities for stereoscopic justice. Rivera emphasizes that such regional fora ensure that international protection may be available where domestic processes are ineffective or unavailing and that U.S. courts are situated within a web of international adjudicative bodies capable of providing a measure of judicial oversight.

As our contributions reveal, the status of international law vis-à-vis the U.S. domestic system remains contested, and may herald a schism on the Court and elsewhere between those willing to look past our borders for interpretive and authoritative guidance and those insisting that it is only domestic law and values that matter. Like the early development of the common law, this is an evolutionary process. As Professor Naomi Roht-Arriaza of Hastings College of Law emphasized in her symposium remarks, these cases create an opportunity for synergistic constitutional, comparative, and international law analysis that will increasingly weave international law norms and discourse into our domestic legal fabric.³³ As more international law issues come before the Court,

to the American Declaration, but not the American Convention; accordingly, the Court does not have jurisdiction over disputes involving the United States, but the Commission does. The Commission, for example, entertained a petition involving detainees on Guantanamo. See Inter-American Commission on Human Rights, *Detainees at Guantanamo Bay, Cuba*, Mar. 12, 2002, http://www.photius.com/rogue_nations/guantanamo.html#_ftn7 (last visited July 30, 2005).

32. Lawrence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 372 (1997) (calling attention to “a community of courts around the world, units engaged in a common endeavor”).

33. Naomi Roht-Arriaza, Remarks at International Law in the United States Legal System: Observance, Application, and Enforcement (Jan. 28, 2005) (transcript on file with the *Santa Clara Law Review*).

it is perhaps inevitable that justices will exhibit a greater facility with international law reasoning and sources, and perhaps even a greater receptivity to consider international law where relevant to constitutional and statutory jurisprudence. As Professor Martinez postulates in her contribution, this receptivity will trickle down to the lower courts, whose judges look to the Supreme Court for guidance. Although the Supreme Court cases to date have not resolved all issues regarding the applicability of international law to executive action or the justiciability of international law norms, they did confirm that executive action, even in a time of war, is not beyond judicial review and that international law at times provides a private right of action for its violation.
