

~~place in constitutional jurisprudence has been addressed and developed by the Supreme Court. International law, essentially customary, was prominent in our early constitutional history, but has hardly been mentioned by the Supreme Court in the last hundred years, and its place in contemporary jurisprudence is less clear and is controversial in important degree. U.S. obligations in, or to, international organizations depend on the treaty establishing the organization, but some such treaties, e.g., the United Nations Charter, impinge on U.S. laws and institutions in unprecedented ways and may engender new constitutional doctrine.~~

### INTERNATIONAL LAW IN THE CONSTITUTIONAL FRAMEWORK

Even now, in our third century under the Constitution and after a century of radical change in the international legal system, most of the international rights and obligations of the United States lie in unwritten, customary, international law. These include the many rights and obligations that for the United States (as for other states) derive from the axioms and fundamentals of the political system: the status of states in the system; the concept of 'state sovereignty' and its implications— independence, territorial integrity and inviolability; the fundamentals of property, contract, and tort in relations between nations; the law of treaties, including the principle *pacta sunt servanda*, that international agreements create obligations and must be observed; the concept of nationality, and a state's responsibility to treat foreign nationals in accordance with international principles of justice; the freedom of the seas; and many others.<sup>2</sup>

#### *International Law as Law for the United States*

'The United States', the first Chief Justice of the United States, John Jay, said, 'by taking a place among the nations of the earth [became] amenable to the law of nations'.<sup>3</sup>

At its birth as a nation,\* the United States found international law—the 'law of nations'—in place, and we have contributed to its development in the intervening centuries.<sup>4</sup> The United States supplemented and modified customary law by thousands of treaties and other international

\* For the United States at its birth, of course, the law of nations was wholly customary law, until the new nation began to conclude treaties.

agreements. International law—customary law and treaty law—has governed, shaped, and influenced U.S. national behavior since the beginning.<sup>5</sup>

International law is law for the United States. As such, it is obligatory upon all whose actions are attributable to the United States under international law: it is binding on Congress, and on the President and the Executive branch: on the states—on state legislatures and state officials, down to the lowest official of city, town or village; on the courts—on the federal courts, from the Supreme Court down to the federal magistrate or administrative judge, and on state courts, from the highest court of appeals to the village magistrate or police court judge. Traditional international law did not ordinarily address the acts of private citizens, but increasingly the law attends to private acts, as in the law against genocide and other gross violations of human rights, on war crimes, on piracy, hijacking and other acts of terrorism, or counterfeiting, even though the law continues to lodge international responsibility for such violations by persons subject to U.S. jurisdiction in the government of the United States. Increasingly, international law requires nation-states to enforce international norms and to punish their violations in national courts.\*

It is principally the President, as 'sole organ' of the United States in its international relations, who is responsible for the behavior of the United States in respect of international law. The President makes legal claims for the United States and reacts to the claims of others. He reflects the views of the United States on legal questions and he justifies U.S. actions under the law—in diplomatic exchange, in judicial or arbitral proceedings, in organs of international organizations, or in the public forum. He participates on behalf of the United States in the inchoate, somewhat mysterious process by which customary international law is made, unmade, remade. Congress, state legislatures, federal and state officials also contribute to 'practice by the United States' which helps

\* In 1993, the United Nations Security Council established tribunals for the trial of war crimes, crimes against humanity, and other gross violations of human rights committed in the former Yugoslavia and in Rwanda. Under the resolutions establishing the tribunals, the United States is legally bound to cooperate with the tribunal, e.g., by arresting and extraditing accused persons for trial by the tribunal. In 1994 the International Law Commission presented a report on a multilateral treaty to establish a permanent international criminal court. See nn. 86, 87 to this chapter.

Under the Genocide Convention and the Convention against Torture the United States is required to make any violation a crime under U.S. law. See n. 85 to this chapter.

make international law,\* for example when they determine and give effect to the rights of foreign states, foreign diplomats, or foreign nationals in the United States, or of foreign vessels off our coasts. Federal and state courts also help make international law when they determine what that law requires in order to decide cases before them.\*\* Congress and state legislatures, federal and state officials, even federal and state courts, can also derogate from international law when they commit acts that put the United States in violation of its obligations. But, in general, these other actors play on the domestic scene only; the President represents what they do to the rest of the world and seeks to justify them under international law; sometimes he confesses violation.

The Framers were strongly committed to the law of nations and assumed that the United States would share that commitment.<sup>6</sup> By, or pursuant to, international agreement, the United States has recognized the authority of international bodies that monitor compliance with particular legal obligations and has accepted the jurisdiction of international tribunals and other bodies for the settlement of many legal disputes.<sup>7</sup> Towards the end of the twentieth century, states—including the United States—have assumed obligations to cooperate with international criminal tribunals.<sup>8</sup> And, contrary to common impression, the United States—generally, ordinarily—carries out its international obligations, as it has for 200 years.†

#### *International law and the political branches*

The Framers assumed that the new federal government would carry out the obligations of the United States under international law. The Constitution expressly gives Congress the power to enact laws necessary and proper to carry out the powers vested in the government of the United States, including, surely, the power to do what international law requires of the United States. The Constitution expressly gives Congress the power to define offenses against the law of nations.‡ The President is given the Executive power generally, and he is to take care that the laws be faithfully executed.§ But the Constitution does not explicitly

\* Customary international law results from the practice of states *opinio juris* (with a sense of legal obligation). See RESTATEMENT (n. 2 to Preface) § 102, Comment *c*.

\*\* See Ch. V, pp. 136 *et seq.*

† 'It is probably the case that *almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time*' (emphasis in the original). Henkin, *HOW NATIONS BEHAVE* (2d edn. 1979) 47.

‡ Art I, sec. 8; see Ch. III.

§ Art. II. See Ch. II.

impose a duty on Congress and the President to carry out international obligations. Is failure to do so a dereliction of duty under the Constitution? Is an act by Congress or the President (otherwise within their powers) unconstitutional because it puts the United States in violation of international law or treaty?

In principle, every nation-state has the power\*—*I do not say the right*—to violate international law and obligation and to suffer the consequences.<sup>9</sup> That power, it appears, is not denied to any nation-state or national government by its own constitution.<sup>10</sup> The U.S. Constitution does not address that question explicitly. The Supreme Court has not addressed it directly. But the Supreme Court, we have seen, has read the Constitution as giving acts of Congress a status in the hierarchy of U.S. law equal to that of a treaty,<sup>11</sup> and as requiring the courts to apply an act of Congress even if inconsistent with an earlier treaty undertaking. By that reading, we must assume that the Constitution does not forbid Congress to enact law that causes the United States to violate its treaty obligations, and that an act that does so, however deplorable, is not a violation of the Constitution.

The Constitution—and the Supreme Court—have had less to say as regards the obligation to respect customary international law. The Constitution took account of the law of nations, and, I believe, assumed that the United States would respect it.<sup>12</sup> Although, we shall see, international law is law of the United States, the Constitution does not say so explicitly and does not guide us as to the place of international law in the hierarchy of U.S. law. But an opaque, confused, and confusing dictum by the Supreme Court in 1900, in *The Paquete Habana*<sup>13</sup> (discussed below), has been interpreted to mean that the courts will give effect to an act of Congress inconsistent with a principle of customary law. If so, it has been assumed, the Constitution is being interpreted as not prohibiting Congress from enacting such laws and thereby putting the United States in violation, and such a law may also be deplorable but is not unconstitutional.

The President is situated differently. He is the direct and the principal repository of the international obligations of the United States. Under the Constitution, the President, as the national Executive and under his Foreign Affairs authority, has the power and the duty to carry out U.S. obligations under international law. In respect of international law as the law of the land, the President is bound to take care that 'the laws be faithfully executed'.

\* That, some would say, is a power inherent in 'sovereignty'.

But, we have seen,\* the United States has the 'sovereign' power—not the right—to denounce or breach a treaty, and it is presumably the President, under his Foreign Affairs power, who has the power to do so on behalf of the United States. And if the United States has the 'sovereign' power—not the right—to act in violation of other principles of international law, presumably the President can exercise that power for the United States, acting under one of his explicit powers or under authority he derives from the powers of the United States inherent in its sovereignty. If so, the fact that an action of the President puts the United States in violation of international law, however deplorable that be, does not, *ipso facto*, render that action a violation of the Constitution.<sup>14</sup>

Thus, under our Constitutional jurisprudence as we understand it today, an action by the President or by Congress that is within their constitutional authority does not become a violation of the Constitution because the Act places the United States in violation of a treaty provision or of a U.S. obligation under customary law. But treaties and principles of customary law are also law of the United States and therefore law for the courts; I consider below the consequences and implications of their character as law for the powers and duties of Congress and of the President, and particularly of the Executive branch, and for courts in deciding cases or controversies before them.

### *International Law as Law of the United States*

International law, we have seen, is law *for* the United States in its relations with other nations. International law is also law *of* the United States, U.S. law for domestic governance. 'The Court', John Marshall said, 'is bound by the law of nations which is a part of the law of the land'; 'international law', the Court declared in 1900, in *The Paquete Habana*, 'is part of our law'.<sup>15</sup> International law is 'self-executing' and ordinarily does not require implementation by Congress.\*\* It is there-

\* See Chs. II and VII.

\*\* Compare the law as to treaties, Ch. VII.

Some constitutional safeguards are interpreted to take account of the principles of international law that antedate the Constitution. See, for example, the right of an accused to have compulsory process for obtaining witnesses in his favor, the Sixth Amendment, into which right was read an exception where the witnesses enjoyed diplomatic immunity from process under international law. See n. 73 to Ch. IX.

Like some provisions in treaties or executive agreements, some principles of international law may require implementation in the United States. For example, war crimes and violations of the international law against genocide or torture, or other

fore part of the constitutional responsibility of the President to 'take care that the laws be faithfully executed'. It is part of our law for the courts to apply. Like treaties and executive agreements, customary international law bows before constitutional prohibitions, notably those of the Bill of Rights.\*

*International law as supreme federal law*

International law, it is established, is law of the land and is supreme, but how it achieved that character and status is not wholly clear or agreed. The Constitution recognizes the 'law of nations' and gives Congress power to define offenses against that law; it says nothing more about international law. The Supremacy Clause of the U.S. Constitution provides that 'the Laws of the United States which shall be made in pursuance [of the Constitution], and all Treaties . . . made under the authority of the United States shall be the supreme Law of the Land', and binding on the states. That clause cites treaties and declares their supremacy; it does not mention customary international law. The Supremacy Clause establishes also the supremacy of 'the Laws of the United States', but it is not obvious that the term was intended to include principles of customary international law as U.S. law. Yet, there is nothing to suggest that the Framers intended higher constitutional status for treaties than for customary law, and much to suggest that they expected the United States to honor both scrupulously. Their commitment was to 'the law of nations' which for them was essentially customary law, including, notably, a state's obligation under customary law to carry out treaties. Their reticence about customary international law in contrast to the several references to treaties did not bespeak a judgment as to their comparative constitutional significances, but had other explanation. The Constitution had to determine who could make treaties for the United States; it sought to deny any treaty power to the states. The Framers wrote treaties explicitly into the Supremacy Clause because the supremacy of treaties to state law was a major issue that had to be resolved, and accepted by the states. Cases arising under treaties were declared to be within the judicial power of the United States because such cases were to be expected; the Framers probably did not anticipate cases or controversies arising under international law until Congress defined offenses under that law or enacted other legislation to

gross human rights violations could not be punished in the United States unless Congress enacted legislation to make them crimes.

\* See Ch. IX.

implement international law, and cases arising under international law would then be cases arising under the laws of the United States.

Perhaps the Supremacy Clause cannot readily be read as declaring international law to be the law of the land;<sup>16</sup> if so, international law has become law of the United States by some other route, perhaps automatically, tacitly. Prior to union, international law had been part of the common law of England and of the American Colonies, then of the states. With union, the United States became a single nation-state with rights and obligations under international law, and perhaps, with union and as a concomitant of union, 'we the people', in ordaining the Constitution, tacitly recognized and accepted international law as U.S. law of extra-constitutional origin.\*

For long, indeed, the history of international law as part of the common law of the states was a source of confusion and controversy. For many years under the Constitution, states appeared to continue to apply international law as part of their common law.\*\*<sup>17</sup> But if for the states customary international law had only the status of their common law, it was presumably subject to modification or repeal by the state legislature. If so, too, state courts could decide for themselves what international law requires, and issues of customary international law, unlike questions arising under treaties, would not raise federal questions and could not be appealed to the Supreme Court for final adjudication.<sup>18</sup> Fifty states could have fifty different views on some issue of international law and the federal courts might have still another view. Indeed, not only would the states be free to disregard the views of the federal courts, but in cases where a federal court is required to apply the law of the state in which it sits, the court would have to apply the state's view on disputed questions of international law.<sup>19</sup>

*Banco Nacional de Cuba v. Sabbatino*,<sup>20</sup> decided in 1964, supports a better, more orderly view. The determination and application of international law are integral to the conduct of foreign relations and are the responsibility of the federal government. International law is determined, 'made', by the federal courts as though it were federal law, and their views bind the state courts.

Whatever the theory and the history, then, at the end of the twentieth century it is established that international law is law of the United States. Like 'the laws of the United States' cited in the Supremacy

\* Compare *Curtiss-Wright*, Ch. I, pp. 25 *et seq.*

\*\* In this regard, it is accepted, the hierarchy of law in the United States differs from that in some other countries where international law may be supreme to domestic legislation, and in some cases even to the constitution. See n. 10 to this Chapter.

Clause, customary law is supreme to state law. International law is considered to be included in the constitutional phrases extending the judicial power of the United States 'to cases arising under [the] Constitution, the laws of the United States, and treaties. . . ' and in the Congressional statutes giving federal courts jurisdiction over cases arising under the laws of the United States. Questions of international law are federal questions; issues of international law that arise in the state courts, then, can be appealed to the Supreme Court. The Supreme Court can determine and establish a single, uniform rule of customary international law for the country, for the states as well as for the national government, for state courts as well as federal courts.<sup>21</sup>

#### *International law in the courts*

Courts in the United States determine and apply customary international law as they interpret and apply U.S. statutes, treaties, and executive agreements. In the oft-quoted language of Justice Gray in *The Paquete Habana*: 'International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.'<sup>22</sup>

In that case, the Supreme Court held that, under international prize law in time of war, fishing vessels belonging to enemy nationals were exempt from capture by armed vessels of the United States and could not be condemned and sold as prize of war. Before and since then, state and federal courts have applied international law in innumerable cases, notably, for example, when they dismiss proceedings against foreign governments, their diplomats, vessels or other public property, because international law gives them immunity from judicial process.<sup>23</sup>

*International law and acts of Congress.* International law is law of the land and will be enforced by the courts, but will they enforce it in the face of other, inconsistent law? Will the courts give effect to international law if the political branches determine to violate it?

International law, we have seen, is binding on the United States, therefore on Congress, and Congress has generally recognized its responsibility to implement and not to frustrate U.S. compliance. On a number of occasions, however, Congress has knowingly refused to carry out U.S. treaty obligations, for example, in the 1990s, the legal obligation of the United States to pay its dues to the United Nations. On a number of occasions, Congress enacted laws that would place the United States in violation of international law—for example, in 1971,

laws that resulted in violation of the United Nations embargo of Rhodesian chrome.\*

U.S. courts do not issue orders to Congress. They cannot direct Congress to appropriate funds, even when failure to do so results in a violation by the United States of an international obligation. In an appropriate case or controversy, a court can declare an act of Congress unconstitutional, but an act of Congress that is inconsistent with international law, I have suggested, is not *ipso facto* unconstitutional.

Here we are concerned not with the constitutionality of an act of Congress but with its relation to customary law as law of the United States and how the courts should treat them when they are in conflict. The Supreme Court has not addressed these questions directly. *The Paquete Habana* (1900) remains the Court's latest pronouncement on the place of international law in the law of the United States.\*\* In restating the principle that 'international law is part of our law', Justice Gray saw fit to interject uncertain qualifications that have troubled our jurisprudence for a hundred years. He said: 'For this purpose, *where 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'.<sup>24</sup>

Later in that opinion he wrote: 'This rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, *in the absence of any treaty or other public act of their own government* in relation to the matter.'<sup>25</sup>

Justice Gray's qualifications are dictum: the case before him did not involve any treaty, or act of Congress (or of the President). They are not supported by explanation or authority. As regards acts of Congress, one may read Justice Gray in light of the fact that he wrote a dozen years after the Supreme Court had held‡ that an act of Congress is equal in law to a treaty, and that therefore a later statute will supersede an earlier treaty obligation for purposes of U.S. law. By that decision, in effect, the Court interpreted the Constitution as not prohibiting Congress to legislate contrary to U.S. treaty obligations and not warranting the courts in holding such legislation unconstitutional. It is perhaps plausible to read Justice Gray's reference to a 'controlling legislative act' as extending the same principle to customary international law. The Constitution, then, does not prevent Congress from enacting law inconsistent with U.S. obligations under customary international law, and the

\* See n. 50 to this chapter.

† Emphasis added.

\*\* But see *Sabbatino*, Ch. V., pp. 137-41.

‡ *Whitney v. Robertson*, n. 11 to this chapter.

courts are obliged to give effect to the later act of Congress (though that places the United States in violation of its international legal obligations).

In the case of treaties, the Supreme Court has read the Constitution as giving treaties and acts of Congress equal authority as law, and has decided that in case of conflict the later in time prevails. Justice Gray's passing dictum apart, the Court has not considered whether principles of customary international law—also the law of the land—are equal in law with treaties and with acts of Congress. For international law, treaty obligations and principles of customary international law are of equal rank, so that the later in time prevails.\* Presumably, since their place in U.S. law derives from their character and status in international law, treaties and principles of customary law have equal status in U.S. jurisprudence too, and the courts would give effect to the later in time. An act of Congress, we saw, inconsistent with a preexisting U.S. treaty obligation, will be given effect by the courts. Without any support in constitutional text, the same principle, presumably, would require the courts to give effect to an act of Congress inconsistent with U.S. obligation under customary law.<sup>26</sup> Like a treaty, too, a supervening principle of international law should not be denied domestic effect because of some provision in an earlier act of Congress.<sup>27</sup>

*The President, international law, and the courts.* Justice Gray's passing dictum in the *Paquete Habana* has proven to be particularly confusing and troubling in respect of the authority of the President and the Executive branch. Gray seemed to declare that the courts must give effect to a principle of international law as U.S. law 'in the absence of a controlling Executive act', or 'a public act of our own Government'.<sup>28</sup> Some have assumed that by these qualifications the Court implied that when such executive (or other public) act contradicted a principle of customary law, the courts would give effect to the executive or other public act and not to the principle of international law.\*\* Assuming that

\* Subject to the doctrine of *jus cogens*: a treaty that is inconsistent with a customary norm that is 'peremptory', of superior, compelling character, is void. See the Vienna Convention on the Law of Treaties, Arts. 53, 64; RESTATEMENT (n. 2 to Preface) § 102, Comment *k* and Reporters' Note 6. And see Art. 103 of the United Nations Charter which provides that the Charter shall prevail over other treaty obligations.

\*\* In fact, it is not clear that the Court's incidental qualification was addressing the significance of a public act that was inconsistent with the international principle. In context, the Court was telling the courts how they should determine whether a particular rule has become a principle of international law. The Court said that one has to explore the practice of states and distill a principle from that practice, unless

to be a correct interpretation of a passing and opaque dictum, it leaves much unexplained. If international law is part of our law, why should a 'controlling executive act' permit—or require—the courts not to give effect to this part of our law? And what kind of act would be 'controlling' for this purpose?

As regards an act of Congress, we have seen, the authority of the act is equal to that of a treaty and presumably also of a principle of customary international law. Congress does not claim authority to violate international obligations of the United States; it insists only that nothing in the Constitution suggests that the legislative powers of Congress are limited by a requirement that its acts be consistent with international law. The authority of the President in respect of international law, however, is more complicated, a complexity deriving from the fact that the President wears two different, distinct hats. His 'Executive power' includes the duty to take care that the laws, including treaties and customary international law insofar as they are part of U.S. law, be faithfully executed. But the President, we know, also has independent constitutional authority in foreign affairs as Executive, as treaty-maker, as 'sole organ', and as Commander in Chief. Under these powers, the President can act in ways that make or affect law in the United States, and it may be that as far as the Constitution is concerned he can exercise these powers even in ways that are inconsistent with U.S. international obligations. Thus, we have seen, the President can denounce

or otherwise terminate a treaty even when that puts the United States in violation of international law.\* Similarly, the President may take other measures that are within his constitutional authority under his foreign affairs power even if they violate international law. For example, the President has acquired constitutional authority to deploy U.S. forces for purposes short of war. If, say, President Reagan had constitutional authority to bomb Libya (in 1986) because of its alleged responsibility for terrorist activities, his constitutional authority to do so was not diminished by the fact that the bombing may have violated U.S. obligations under the United Nations Charter. Surely, the courts would not enjoin the bombing.\*\*

The confusion deriving from the President's dual constitutional character is aggravated when the President acts on matters within the United

a public act by some branch of the U.S. government has already determined and codified the principle on behalf of the United States. By this reading, the Court's statement did not address at all whether the Executive (or Congress) is free to act contrary to international law. And see n. 35 to this chapter.

\* See Ch. VII.

\*\* See Ch. II and Ch. V, p. 146, n. 66 to Ch. V.

States and which, therefore, are subject to domestic U.S. law. A treaty may address matters that have effect on rights and interests within the United States; in respect of those matters a treaty is domestic law and it is the President's duty to execute the treaty. The courts will enjoin any violation of the treaty or any failure by Executive officials to give it effect.\* But if the President, in the exercise of his foreign affairs powers, should denounce or otherwise terminate the treaty, the treaty no longer exists; it is no longer law of the land; the Executive branch will not execute it; the courts will not enforce it. Without terminating a treaty, the President, acting under his foreign affairs powers, may decide that one or more treaty provisions should not be carried out. Such a decision would create tension between the President's authority under his foreign affairs power to act without regard to U.S. international obligations, and the President's duty to take care that the treaty, as law of the United States, be faithfully executed. Perhaps because a decision to act in disregard of a treaty is rarely a decision of the President but a failure by lesser Executive officials, the courts have regularly called on the Executive branch to abide by U.S. treaty undertakings.

Unlike treaties, however, principles of customary international law cannot be denounced or terminated by the President and cannot be eliminated from the law of the United States by any Presidential act. If the President acts in violation of international law in a matter that does not affect rights and interests in the United States, the status of international law as law of the United States is ordinarily not implicated (and the President's act is not likely to come within the jurisdiction of U.S. courts). But where a principle of customary international law applies to rights and interests within the United States, a Presidential decision under his Foreign Affairs power to act in violation of that principle would conflict with the President's constitutional duty to take care that the principle of international law, as law of the United States, be faithfully executed.

In that case, too, it may be that the President's Foreign Affairs power, as a source of constitutional authority of some legislative import, may be exercised without regard to international legal restraints. But it should require an act of the President, not of some lower Executive official, and it should be an act that claims justification as an exercise of Presidential Foreign Affairs power. The courts ought not tolerate, and should give relief, when members of the Executive bureaucracy simply refuse or fail to give effect to principles of customary law as law of the

\* See Ch. VII, p. 207. Compare *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), discussed in Ch. IX, p. 306.

United States, as the courts do when the Executive fails to honor a treaty.

In recent decades, particularly with the growth of a customary international law of human rights, a number of persons have asked the courts to order the Executive branch to give effect to principles of customary law as law of the United States. And courts have floundered in trying to resolve the tension between Presidential authority to act, even in disregard of international law, and his duty to execute the law, including international law. The Supreme Court has not been helpful.\*

One intermediate federal court struggled with the question in *Garcia-Mir* (1986).<sup>29</sup> In that case, the Attorney General of the United States had continued in detention for many months many Cubans who had come to the United States, whom the United States did not wish to admit but whom it could not deport because no other country would accept them. The persons detained claimed that their prolonged detention was arbitrary and therefore a violation of a principle of customary international law. The Court of Appeals accepted the argument that the detention violated international law but concluded that the detention, authorized by the Attorney General, is a 'controlling executive act' (in the words of *The Paquete Habana*) and therefore overrides the principle of international law prohibiting the detention.

In my view, *Garcia-Mir* misinterpreted and misapplied *The Paquete Habana*. The court of appeals apparently considered *any* act of the President to be 'controlling', and extended that to include an act by the Attorney General. The court took the view that the President—and the Attorney General—had power to 'disregard international law in the service of domestic needs';<sup>30</sup> I know nothing to support that conclusion. I do not believe the Attorney General (or the President) can disregard international law that is part of our law any more than he (or she) can disregard any other law. The court did not find that, as a result of some action within the President's constitutional power, the principle of inter-

\* The President need not, may not, execute a treaty if it has been terminated, or has otherwise ceased to be binding under international law. He may not execute the treaty as law of the United States if Congress has enacted legislation superseding it. The President cannot terminate a principle of international law and such principles ordinarily continue in existence indefinitely; the President's obligation to take care that the principle be faithfully executed also remains. The President may not execute a principle of international law as U.S. law, if Congress has superseded it by subsequent legislation. I suggest here that the President's obligation to execute a principle of international law may bow before a Presidential act within his constitutional Foreign Affairs power. In the absence of such a Presidential act, the Executive branch is bound to take care that it be faithfully executed.

national law against arbitrary detention had ceased to be a legal obligation of the United States. There was no suggestion that the President, acting under his constitutional power, had by executive agreement or executive order, made law that superseded the rule of international law forbidding arbitrary detention as domestic law. There was no suggestion that the President ordered the detention in the valid exercise of some independent constitutional authority as 'sole organ' or as Commander in Chief that might have effect as law in the United States.

Only such Presidential acts, I believe, might constitute 'controlling executive acts' permitting the courts to give them legal effect in disregard of international law as the law of this land. In the absence of such controlling acts, the court in *Garcia-Mir* should have required the Attorney General to take care that international law be faithfully executed and to terminate the detention.<sup>31</sup>

*Violations of international law by foreign states.* That international law is the law of the United States means that, as in the case of treaties, courts in the United States will give effect to the obligations of the United States under customary international law: at the behest of affected private parties,\* courts will prevent violations of international law by the states or by federal officials. That doctrine itself gives no one rights, remedies, or defenses against a foreign government for its violation of international law.

That has not always been understood. Thus, when Castro's Cuba expropriated U.S. properties, probably in violation of international law, it was urged that the courts of the United States had to refuse to give effect to these expropriations, must reject claims by the Cuban government of title to the property, and even afford the victim a remedy against Cuba.<sup>32</sup> The argument overlooked that, though international law is part of the law of the United States, the law of the United States has no application to what Castro did in Cuba. Moreover, except as otherwise provided by treaty or by special doctrine (as in human rights law), international law establishes rights, duties, and remedies for states against states; Castro's violations, then, might be an 'international tort' against the United States giving rights and remedies to the United States, but not to any private victims. International law itself, finally, does not require any particular reaction to violations of law; it does not require nations and national courts to refuse legal effect to violations by other nations. Whether and how the United States should react to such violations are domestic, political questions: the courts will not assume

\* Or, as regards violations by a state, perhaps at the behest of federal officials. See Ch. VII, pp. 207-8 and corresponding notes.

any particular reaction, remedy, or consequence.<sup>33</sup> Of course, Congress could legislate that the courts should refuse to recognize Castro's title or should give private persons a remedy\* against Cuba (and might incorporate by reference the norm of international law to guide the courts) but it would be not international law but the federal statute that gave the courts their mandate.<sup>34</sup>

In one recent series of cases, the federal courts have found authority in an old act of Congress to give remedies for certain violations of international law by foreign states or officials. Beginning in 1789, Congress has given the lower federal courts jurisdiction of cases 'where an alien sues for a tort only [committed] in violation of the law of nations'.<sup>35</sup> In 1980, in *Filartiga*, a court of appeals interpreted the statute as authorizing a remedy in tort to an alien against a foreign official who had committed torture, a gross violation of human rights which the court determined to be a violation of customary international law;\*\* other courts have followed suit.<sup>36</sup>

At the end of the twentieth century, customary international law, together with treaties which depend on customary law, remains the core of international governance and a pillar of U.S. foreign relations. Like treaties, customary international law is law for the United States in relations with other nations, as well as law of the United States for its political institutions, its courts, and its citizens. Like treaties, customary international law must fit into the U.S. constitutional framework and must find and keep its place in constitutional jurisprudence. Unlike treaties which have developed their part in the constitutional life of the United States, customary international law remains full of constitutional uncertainties. The Supreme Court has barely glanced at customary law in the twentieth century, and what the Court said in 1900, in opaque dictum and in outdated context, has only sown and harvested confusion. Surely, it is time for the Court 'to say what the law is', beginning by revisiting the reverence of the Framers for the Law of Nations, and establish its clear and honorable place in our constitutional life.

\* Compare the Helms-Burton Act, 'Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996'. P.L. 102-14, 1996, Ch. V, n. 36.

\*\* The court did not feel obliged to decide whether the act of Congress merely provided a federal forum for acts that were torts under international law or at common law, or an applicable state law, or whether Congress implicitly defined a new federal tort law for the federal courts to apply in the circumstances indicated (as it might define criminal offenses against the law of nations). See U.S. Constitution, Art. I, sec. 8.