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## International Law as Law in the United States

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# INTERNATIONAL LAW AS LAW IN THE UNITED STATES

Louis Henkin\*

"International law is part of our law." Justice Gray's much-quoted pronouncement in *The Paquete Habana*<sup>1</sup> was neither new nor controversial when made in 1900, since he was merely restating what had been established principle for the fathers of American jurisprudence and for their British legal ancestors. And Gray's dictum remains unquestioned today. But, after more than two hundred years in our jurisprudence, the import of that principle is still uncertain and disputed. How did, and how does, international law become part of our law? What does it mean that international law is a part of our law? What is the relation of that part of our law to other parts of our law?

## I. INTERNATIONAL LAW AS FEDERAL LAW

When international law — "the law of nations" — first became part of our law can be readily stated; *how* it became our law has been a conceptual issue not without jurisprudential implications. That it is part of federal, not state, law has been recognized only recently.

International law became part of "our law" with independence in 1776. One view has it that the law of nations came into our law as part of the common law.<sup>2</sup> In the eighteenth century, the law of nations was part of the law of England,<sup>3</sup> and English law, including the law of nations, applied in her colonies. With American independence, the law of England in the colonies (including the law of nations) was "received" as common law in the

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Some of the issues discussed here were dealt with some years ago and somewhat differently in L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (2d ed. 1975).

1. 175 U.S. 677, 700 (1900). Marshall made much the same statement in *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815). Marshall spoke of "the laws of nations," as did the Constitution and early statutes, rather than of "international law." The law of nations seems to have encompassed more than is comprehended by "international law" today, apparently including admiralty and general principles of the "law merchant" applicable to transnational transactions. See Dickinson, *The Law of Nations as Part of the National Law of the United States* (pt. 1), 101 U. PA. L. REV. 26, 26-27 (1952).

2. See generally L. ERADES & W. GOULD, *THE RELATION BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW IN THE NETHERLANDS AND IN THE UNITED STATES* (1961); R. MASTERS, *INTERNATIONAL LAW IN NATIONAL COURTS* (1932); P. WRIGHT, *THE ENFORCEMENT OF INTERNATIONAL LAW THROUGH MUNICIPAL LAW IN THE UNITED STATES* 225-26 & n.10 (University of Illinois, Studies in the Social Sciences, Vol. V, No. 1) (1916 & reprint 1967); Dickinson, *supra* note 1, at 26, 33; Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 AM. J. INTL. L. 239, 239 (1932); Sprout, *Theories as to the Applicability of International Law in the Federal Courts of the United States*, 26 AM. J. INTL. L. 280, 282-85 (1932).

3. See, e.g., *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 228 (1796); *Triquet v. Bath*, 3 Burr. 1478, 1481, 97 Eng. Rep. 936, 938 (K.B. 1764); 4 W. BLACKSTONE, *COMMENTARIES* \*67.

United States.<sup>4</sup>

A different conception sees the law of nations as coming into our law not by "inheritance" but by implication from our independence, by virtue of international statehood.<sup>5</sup> An entity that becomes a State in the international system is *ipso facto* subject to international law. While the obligations of international law are upon the State as an entity, a State ordinarily finds it necessary or convenient to incorporate international law into its municipal law to be applied by its courts. In the United States, neither state constitutions nor the federal Constitution, nor state or federal legislation, have expressly incorporated international law; from our beginnings, however, following the English tradition, courts have treated international law as incorporated and applied it as domestic law.

The two conceptions, and variations upon them, may bear different consequences. If international law was part of the common law that each state received from England, international law was state law. It would cease to be state law and become federal law only if the U.S. Constitution, or an act of Congress pursuant to the Constitution, so provided. On the other hand, if international law became domestic law by virtue of independence, its status as state or federal law may turn on the international character of our independence and the status of the states between 1776 and 1789. Some have insisted that during those years the states were thirteen independent states (in the international sense), each equal in status to England, France and other nations of the time, each subject to international law.<sup>6</sup> Each state decided for itself whether to incorporate international law, but all of them did so, in the tradition inherited from England. On this view, as on the "common law" view, international law was state law between 1776 and 1789 and remained state law unless the federal Constitution or later federal law pursuant to the Constitution rendered it federal law.

A different view, however, concludes that the thirteen states were never independent States; for international purposes we were from independence one nation, not thirteen.<sup>7</sup> By virtue of independence and statehood, inter-

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4. See, e.g., *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 198 (1815) (Marshall, C.J.); *Talbot v. Seeman*, 5 U.S. 1, 35 & 43, 1 Cranch 1, 36 & 43 (1801) (Marshall, C.J.); *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 161 (1795) (Iredell, J.); see also Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1043 (1967). In *Respublica v. De Longchamps*, 1 U.S. 119, 1 Dall. 111 (O. & T. Pa. 1784), a Philadelphia court treated a violation of international law as a violation of state law. 1 U.S. at 123, 1 Dall. at 114.

5. See, e.g., *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) (Wilson, J.); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793); 1 Op. Atty. Gen. 26, 27 (1792). Compare the suggestion that incorporation is implied in the constitutional grant of authority to Congress to define offenses against the law of nations, U.S. CONST. art. I, § 8, cl. 10; see W. WILLOUGHBY, *THE FUNDAMENTAL CONCEPTS OF PUBLIC LAW* 295 (1924); cf. *The Rapid*, 12 U.S. (8 Cranch) 155, 162 (1814) ("The law of prize is part of the law of nations . . . . [The doctrine in question] was the law of England before the Revolution, and therefore constitutes a part of the admiralty and maritime jurisdiction conferred on this Court in pursuance of the Constitution.").

6. See, e.g., *Exceptions and Briefs of the Common Counsel States at 94-96, Supplemental Brief for the Common Counsel States at 283-311, and 1 Appendix to the Exceptions and Briefs of the Common Counsel States at 230-39* (testimony of Philip C. Jessup), *United States v. Maine*, 420 U.S. 515 (1975).

7. See Morris, *The Forging of the Union Reconsidered: A Historical Refutation of State Sovereignty over Seabeds*, 74 COLUM. L. REV. 1056 (1974).

national law became binding on the United States, not on the individual states. Between 1776 and 1789, there being no national domestic law, international law could not be incorporated into national law, but the national obligations of the United States could be carried out through state law and institutions.<sup>8</sup> In 1789, the obligations of the United States to give effect to international law became effectively the responsibility of the new federal government, to be carried out through federal institutions (including federal courts), through state institutions (including state courts), or both.

Between 1776 and 1789, then, international law was the law of each of the thirteen states, either as state common law, or by incorporation pursuant to the state's international obligations or those of the United States. Whatever the basis, the status of international law as state law could have been changed, or confirmed, in 1789 when the states united into "a more perfect union" — but the new Constitution did not expressly address the matter. The Constitution recognized that the United States was subject to the law of nations and gave Congress the power to define offenses against the law of nations.<sup>9</sup> The judicial power of the United States was extended to cases arising under treaties, cases affecting ambassadors, cases within admiralty or maritime jurisdiction, and controversies to which foreign states or citizens are party.<sup>10</sup>

But neither the constitutional grants to Congress and the federal courts, nor any act of Congress, declared or necessarily implied that the law of nations was incorporated as self-executing domestic law,<sup>11</sup> or that it had the status of law of the United States rather than of the states. Nevertheless, from our national beginnings both state and federal courts have treated customary international law as incorporated and have applied it to cases before them without express constitutional or legislative sanction.

Early in our history, the question whether international law was state law or federal law was not an issue: it was "the common law."<sup>12</sup> During the reign of *Swift v. Tyson*,<sup>13</sup> when federal and state courts determined the common law independently, they also determined and applied the law of nations independently; in doing so they did not, nor did they need to, characterize international law as either federal or state law. State legislatures

8. In 1779 the Continental Congress resolved that the United States would cause "the law of nations to be most strictly observed." 14 JOURNALS OF THE CONTINENTAL CONGRESS 635 (W. Ford ed. 1909). In 1781 it recommended that the states adopt laws to punish offenses against the law of nations. 21 *id.* at 1136-37 (G. Hunt ed. 1912).

9. U.S. CONST. art. I, § 8, cl. 10. Congress early gave the federal courts jurisdiction over civil actions "by an alien for a tort only, committed in violation of the law of nations." 28 U.S.C. § 1350 (1982) (derived from the Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77); *see Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

10. U.S. CONST. art. III, § 2.

11. It is plausible that admiralty and maritime law was incorporated by implication in the grant of jurisdiction to the federal courts. Maritime law was a very large component of the law of nations of the time. *See* note 5 *supra*; note 22 *infra*.

12. *See, e.g.*, cases cited at note 4 *supra*; *Filartiga v. Pena-Irala*, 630 F.2d 876, 886-87 (2d Cir. 1980). State cases have not been numerous, *see, e.g.*, *Peters v. McKay*, 195 Or. 412, 238 P.2d 225 (1951), but state courts have regularly applied the international law of sovereign or diplomatic immunity. *See, e.g.*, *Hannes v. Kingdom of Roumania Monopolies Inst.*, 260 A.D. 189, 20 N.Y.S.2d 825 (N.Y. App. Div. 1940).

13. 41 U.S. (16 Pet.) 1 (1842).

did not assert authority to supersede it as internal law in the state. Congress sometimes incorporated international law by reference in federal legislation,<sup>14</sup> and sometimes acted to supersede international law with domestic law, but such acts of Congress did not declare or imply that international law was federal law.<sup>15</sup>

*Erie Railroad v. Tompkins*<sup>16</sup> ended the myth that there was an independent "common law," broodingly omnipresent, which the federal courts could determine as well as, and independently of, the courts of the states. A federal court in diversity cases, it was decided, had to apply the law of the state in which it sat, and was bound to apply the common law of that state as determined by the courts of that state. So great a judge as Learned Hand apparently assumed that international law was part of state common law for this purpose and that a federal court in diversity cases had to apply international law as determined by the courts of the state in which it sat.<sup>17</sup> It would follow, presumably, that a determination of international law by a state court was a question of state law, not of federal law, and thus was not subject to review, revision, or independent and final determination and harmonization by the Supreme Court of the United States.<sup>18</sup> Only where they

14. In the area of criminal law, Congress has legislated against "piracy, as defined by the law of nations." 18 U.S.C. § 1651 (1982). An early version of that legislation, the Piracy Act of 1819, ch. 77, § 5, 3 Stat. 510, 513-14, was upheld in *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820). Also, Congress early legislated against assaulting diplomats "in violation of the law of nations." 18 U.S.C. § 112 (1970) (current version at 18 U.S.C. § 112 (1982)) (derived from the Crimes Act of 1790, ch. 9, § 28, 1 Stat. 112, 118); see *Republica v. De Longchamps*, 1 U.S. 119, 1 Dall. 111 (O. & T. Pa. 1784).

Certain property claims were to be adjudicated according to "the law of nations." Act of Apr. 19, 1860, ch. 34, § 1, 12 Stat. 838, 838-39; see *United States v. Repentigny*, 72 U.S. (5 Wall.) 211, 257-58 (1866).

The Court construed article 15 of the Articles of War, 10 U.S.C. § 1486 (1940) (current version at 10 U.S.C. § 821 (1982)), which invoked "the law of war as including that part of the law of nations which prescribes, for the conduct of war . . ." See *Ex Parte Quirin*, 317 U.S. 1, 27-28 (1942).

15. The courts early began to assume that Congress did not intend to violate international law and construed statutes accordingly. See, e.g., *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 117-18, 2 Cranch 64, 118 (1804) (Marshall, C.J.); *Talbot v. Seeman*, 5 U.S. 1, 43, 1 Cranch 1, 43 (1801) (Marshall, C.J.).

16. 304 U.S. 64 (1938).

17. See *Bergman v. De Sieyes*, 170 F.2d 360, 361 (2d Cir. 1948):

[S]ince the defendant was served while the cause was in the state court, the law of New York determines [the service's] validity, and, although the courts of that state look to international law as a source of New York law, their interpretation of international law is controlling upon us, and we are to follow them so far as they have declared themselves.

However, Judge Hand continued:

Whether an avowed refusal to accept a well-established doctrine of international law, or a plain misapprehension of it, would present a federal question we need not consider, for neither is present here.

170 F.2d at 361.

18. Before *Erie*, the Supreme Court had denied review of state determinations of international law since such determinations involved questions of "general law" rather than "federal questions." See *Oliver American Trading Co. v. Mex.*, 264 U.S. 440 (1924); *New York Life Ins. Co. v. Hendren*, 92 U.S. 286 (1875); see also *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 266 U.S. 580 (1924). But see *New York Life Ins. Co. v. Hendren*, 92 U.S. at 287-88 (Bradley, J., dissenting).

In addition, state courts felt free to go their own way in adjudicating matters governed by international comity rather than by international law. Compare *Hilton v. Guyot*, 159 U.S. 113

had jurisdiction on a basis other than diversity of citizenship could federal courts decide international law independently and differently from the states.

Such a state of affairs, it was finally recognized, made no sense. International law, obviously, was not state law. The law of nations was the law of the political community of States developed by the practice of States and modified by State treaties, and it was the United States, not the individual states, that was the relevant national entity for international purposes. Questions of international law engaged the responsibility of the United States towards other nations. It made no sense that questions of international law should be treated as questions of state rather than federal law; that they could be determined independently, finally and differently by the courts of fifty states, and differently also by federal courts for their own, "non-diversity" purposes; that, whereas the interpretation of a U.S. treaty was a federal question to be decided finally by the Supreme Court for all courts (and domestically, at least, for the political branches as well), determinations of customary international law by state courts were not reviewable by the Supreme Court. Therefore, in a famous article, Judge Philip Jessup decried the notion that *Erie v. Tompkins* should be held to require federal courts to follow the determinations of international law by state courts in diversity cases.<sup>19</sup>

In *Banco Nacional de Cuba v. Sabbatino*,<sup>20</sup> the Supreme Court effectively resolved the issue. In that case the Court reestablished the Act of State doctrine and declared it to be a principle of federal law binding on the states. The Act of State doctrine is not a principle of international law, but instead a principle of judge-made, domestic "foreign relations law," serving the foreign relations needs of the United States. However, in deciding that the Act of State doctrine is federal law, binding on the states and not within the scope of *Erie v. Tompkins*, the Court invoked Judge Jessup's views rejecting the applicability of *Erie* to international law.<sup>21</sup> As a result, there is now general agreement that international law, as incorporated into domes-

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(1895) (refusing to give full faith and credit to a French judgment), *with* *Johnston v. Compagnie Générale Transatlantique*, 242 N.Y. 381, 152 N.E. 121 (1926) (giving full faith and credit to a French judgment).

19. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INTL. L. 740 (1939). In 2 THE FEDERALIST NO. 42, at 50 (New York 1788), Madison justified the clause in the Constitution giving authority to Congress to define offenses against the law of nations and criticized the absence of such authorization in the Articles of Confederation, which "consequently leave it in the power of any indiscreet member [*i.e.*, state] to embroil the confederacy with other nations."

20. 376 U.S. 398 (1964).

21. See *Sabbatino*, 376 U.S. at 425. Judge Henry Friendly made clear that *Erie v. Tompkins* applied only to state common law in diversity cases where state law had to be applied, and that there was indeed, even after *Erie*, a "federal common law" — *i.e.*, law made by the federal courts pursuant to authority delegated to them by the Constitution or Congress, or inherent in their character as courts. Such "common law" was federal law binding on the states. See Friendly, *In Praise of Erie — And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964). For the authority of the Supreme Court to determine the federal common law, and its supremacy to state law, see, *e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423-27 (1964); *Hinderlider v. La Plata River Co.*, 304 U.S. 92, 110 (1938); Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 500 (1954); Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805 (1964); Hill, *supra* note

tic law in the United States, is federal, not state law; that cases arising under international law are "cases arising under . . . the Laws of the United States" and therefore are within the judicial power of the United States under article III of the Constitution; that principles of international law are incorporated in the law of the United States are "Laws of the United States" and supreme under article VI; that international law, therefore, is to be determined independently by the federal courts, and ultimately by the United States Supreme Court, with its determination binding on the state courts; and that a determination of international law by a state court is a federal question subject to review by the Supreme Court.<sup>22</sup>

To say that international law is U.S. law means that in principle it should be applied wherever U.S. law applies; it says nothing about whether international law (as U.S. law) applies in particular circumstances. Thus, there was much confusion when the Supreme Court declared, in *Sabbatino*, that courts in the United States should not sit in judgment on an act of a foreign State within its territory, even when the foreign act violated international law. Critics wished to know why, in a case tried in a U.S. court, the court should not apply international law to declare the foreign act illegal if international law is part of the law of the United States.

International law *is* law of the United States, but U.S. law (including

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4, at 1073-79; Moore, *Federalism and Foreign Relations*, 1965 DUKE L.J. 248; Note, *Federal Common Law and Article III, A Jurisdictional Approach to Erie*, 74 YALE L.J. 325 (1964).

22. See RESTATEMENT OF THE LAW, FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 131, comments d, e, & reporters' notes 2-4 (Tent. Draft No. 1, 1980) [hereinafter cited as RESTATEMENT (REVISED)].

In 2 THE FEDERALIST NO. 80, at 305 (New York 1788), Hamilton cites "cases arising upon treaties and the laws of nations" as proper for the jurisdiction of federal courts. See also 1 THE FEDERALIST NO. 3, at 13-14 (J. Jay) (New York 1788). The law of nations was linked with treaties in earlier drafts of what became article III of the Constitution; there is no evidence that its elimination was intended to deny federal status to international law. Perhaps it was considered that cases arising under international law were covered by the other cases or controversies enumerated. See text at note 10 *supra*; 2 M. FARRAND, THE RECORD OF THE FEDERAL CONVENTION OF 1787, 136, 157 (rev. ed. 1937); 3 *id.* at 117 app., 608 app.

It is instructive to compare the history of admiralty and maritime law in the law of the United States. Maritime law came to the United States from England either by inheritance together with the common law, or by incorporation as part of the law of nations. See note 1 *supra* and accompanying text. Admiralty jurisdiction was expressly conferred by the Constitution on the federal courts; the Supreme Court's adjudications were from the beginning recognized as supreme to state law and binding on state courts. The maritime law applied by U.S. courts in the early years was clearly international in origin, part of the law of nations; the courts looked to a "general maritime law" applied not only in England but in other countries.

In the nineteenth century, however, maritime law in the United States was domesticated. It began to apply to internal waters as well as to international waters. Foreign citations became infrequent. Particularly because of the increasingly domestic character of the law, Congress was found to have legislative power to modify it, and Congress indeed modified it with little regard to developments elsewhere. A reasonably clear line developed between national maritime law, which is "private" law addressing private interests and not governed by binding principles of international law, and the international law of the sea governing relations between States. When Congress legislated to modify admiralty law it was not violating any law of international character or any international obligation. See generally G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, ch. 1 (2d ed. 1975); Note, *From Judicial Grant to Legislative Power: the Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214 (1954). Today maritime law applied by the courts is U.S. law and only U.S. law; public international law remains international law, determined by international criteria, even when the courts incorporate and apply it. Congress cannot amend it; it can only supersede it for domestic purposes.

international law as part of that law) does not ordinarily govern an act by a foreign state in its own territory. For a U.S. court to apply U.S. law (including international law as part of that law) to the act of a foreign state requires a prior determination that U.S. law is applicable to the particular act, event, transaction or interest in the foreign country, say, under appropriate principles of conflicts of law or because Congress has so directed. In *Sabbatino*, the Supreme Court decided that, even if applicable principles of conflicts of law would direct the courts to apply U.S. law, the law that they were to apply included the Act of State doctrine, which precluded the application of other U.S. law or policy, including international law as U.S. law, to the act of the Cuban government. When Congress later enacted the Second Hickenlooper Amendment, which directed the courts to apply U.S. law including international law, in certain circumstances, the courts proceeded to do so.<sup>23</sup>

## II. INTERNATIONAL LAW IN THE HIERARCHY OF U.S. LAW

“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>24</sup>

International law is not merely law binding on the United States internationally but is also incorporated into United States law. It is “self-executing” and is applied by courts in the United States without any need for it to be enacted or implemented by Congress.<sup>25</sup> Since it is law not enacted by Congress, and the principles of that law are determined by judges for application in cases before them, customary international law has often been characterized as “federal common law” and has been lumped with authentic federal common law — the law made by federal judges under their constitutional power or under authority delegated by Congress.

In fact, however, to call international law federal common law is misleading. It is *like* federal common law in that both have the status of federal law for purposes of supremacy to state law. And it is *like* federal common law in that determinations of customary international law by the Supreme Court are law in the United States and binding on the states. But it is not federal common law in other significant respects. Unlike federal common law, customary international law is not made and developed by the federal courts independently and in the exercise of their own law-making judgment.<sup>26</sup> In a real sense federal courts *find* international law rather

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23. See *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

24. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

25. Treaties, on the other hand, may be either self-executing or non-self-executing, and the latter, while equally binding obligations of the United States, are not incorporated into domestic law so as to be applied by the courts. See *United States v. Percheman*, 32 U.S. 51, 7 Pet. 51 (1833); *Foster v. Neilson*, 27 U.S. 108, 2 Pet. 253 (1829); RESTATEMENT (REVISED), *supra* note 22, § 131(3) & comment h (Tent. Draft No. 1, 1980).

26. Determining international law is not to be confused with making U.S. federal common law under the broad judicial “foreign affairs power” exercised in *Sabbatino* and elsewhere. See note 21 *supra*.



than make it, as was not true when courts were applying the "common law," and as is clearly not the case when federal judges make federal common law pursuant to constitutional or legislative delegation.<sup>27</sup> The courts determine international law for their purposes, but the determinants are not their own judgments or the precedents of U.S. courts.<sup>28</sup> In principle, the courts interpret law that exists independently of them, law that is "legislated" through the political actions of the governments of the world's States. It is determined primarily and more authoritatively by international courts and with equal authority by domestic courts of other countries. And it is the executive branch, far more than the courts, that acts for the United States to help legislate customary international law.

In general, it may not be important whether international law when applied by the courts is properly characterized as "common law" or merely described as "like common law in important respects." But the loose characterization of the law of nations as common law has led — I think — to jurisprudential conclusions that are unwarranted. For a while, we have seen, referring to our customary international law as common law misled judges in diversity cases, causing them to treat international law as state rather than federal law. Recently, because they assumed that international law is, or is like, judge-made common law, a few lawyers have tended to relegate it to the subordinate status that federal common law has in the hierarchy of federal law — lower than that of treaties or statutes of the United States. In particular, they have argued that even if the United States has fully participated in and has supported the creation of a rule of customary law, such law is not self-executing, is not domestic law in the United States, and the courts should not give it effect in the face of an earlier treaty or statute of the United States. Presumably, this view would also hold that the President cannot give effect to customary law in the face of an earlier treaty or act of Congress, although he is free to make and must give domestic effect to a treaty in the face of an earlier act of Congress.

To understand that view, and why I have doubts about it, one must recall the accepted jurisprudence as it relates to the categories of federal law. The Constitution, we know, is supreme law.<sup>29</sup> Acts of Congress and treaties of the United States are "inferior" to the Constitution. A statute inconsistent with the Constitution is invalid; a treaty inconsistent with the Constitution may be binding internationally but will not be enforced as law

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27. International law is also not federal common law in that it is not subject to legislative modification by Congress. Congress can define offenses against the law of nations; it can pass laws inconsistent with international law, and the courts will give effect to the act of Congress and disregard international law. But Congress cannot legislate international law or amend it. A determination by Congress as to the rule of international law on a particular subject is not binding on the courts, although even if the courts do not agree with that determination, they may see fit to interpret the act of Congress as a directive to apply that determination as domestic law without regard to what international law actually requires. *See, e.g.*, the courts' treatment of Congress' statement of international law in the Hickenlooper Amendment, *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957 (S.D.N.Y. 1965), *aff'd.*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

28. A determination of international law by the U.S. Supreme Court, however, is law in the United States and binding on lower federal courts and on state courts. *See* RESTATEMENT (REVISED), *supra* note 22, Introduction, at 1 (Tent. Draft No. 5, 1984).

29. *See* *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137 (1803).

in the United States.<sup>30</sup> The language of the Supremacy Clause of the Constitution has been read to imply that laws and treaties of the United States are not only supreme over state law, but are equal in status and authority to each other.<sup>31</sup> It is not unconstitutional for Congress to enact law inconsistent with a treaty of the United States; it is not unconstitutional for the President, with the consent of the Senate, to make a treaty inconsistent with an earlier act of Congress. And in the case of inconsistency between a statute and a treaty, the later one will be given effect by the courts and by the executive.

The place of federal common law, of federal law made by judges pursuant to their inherent constitutional authority or to authority delegated them by Congress, has not been conclusively determined. In principle, any authority exercised by the courts under their own constitutional authority ought to be equal to the authority of Congress or of the treaty-makers, and their "enactments" entitled to equal weight; here too the later-in-time might prevail in case of conflict. But the common law tradition that judges are bound by acts of the legislature, whether earlier or later, has discouraged the view that law made by judges pursuant to their own constitutional authority is equal in status to legislation, and that federal courts can make federal law inconsistent with an earlier act of Congress.<sup>32</sup> Ironically, law made by courts not on their own constitutional authority but pursuant to authorization by Congress would presumably draw on congressional authority and like a later act of Congress could supersede earlier legislation.

Assuming that authentic federal common law cannot be made and given

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30. See *Reid v. Covert*, 354 U.S. 1, 6 (1957) (Black, J.); RESTATEMENT (REVISED), *supra* note 22, § 721 comment a & reporters' note 1 (Tent. Draft No. 4, 1983).

31. The equality of federal statutes and treaties in U.S. law, and the later-in-time rule, have commonly been supported by reference to the Supremacy Clause. See, e.g., *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). It has been recognized that nothing in the Supremacy Clause requires this result; it says that both treaties and federal law are supreme as to state law, not that they are equal to each other. See *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1870); *Taylor v. Morton*, 23 F. Cas. 784, 785 (C.C.D. Mass. 1855) (No. 13,799) (Curtis, Circuit Justice), *affid.*, 67 U.S. (2 Black) 481 (1862); L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 163-64 (2d ed. 1975). Both the equality of statutes and treaties and the later-in-time rule have, however, been upheld in numerous cases and seem firmly established. See cases cited this note *supra*; L. HENKIN, *supra* this note, at 410-13 nn.111-16.

32. See, e.g., *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957 (S.D.N.Y. 1965), *affid.*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968) (giving effect to federal legislation modifying the Act of State doctrine as established by the Supreme Court in *Sabbatino*). Compare L. HENKIN, *supra* note 31, at 458 n.55 (1972), with R. FALK, *THE AFTERMATH OF SABBATINO* (1965), and Cardozo, *Congress versus Sabbatino: Constitutional Considerations*, 4 COLUM. J. TRANSNATL. L. 297 (1966).

The Act of State doctrine was propounded by the courts on their own authority but it determined the substantive law to be applied — essentially a congressional responsibility. As to such judge-made law the case for congressional supremacy, rather than parity, is strong. However, judge-made "law" that is rooted in the separateness and independence of the judiciary — e.g., rules of courts, perhaps even rules of evidence, and some aspects of the political question doctrine — implicates the judicial function, and may be constitutionally immune from congressional regulation, or its existence might at least argue for judicial parity, if not supremacy, in regulation, but no case has so held. Cf. *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871) (Act of Congress held invalid since it infringed on the powers of the judicial and executive branches by prescribing a rule of decision to the former and impairing the pardon power of the latter).

effect in the face of an earlier inconsistent treaty or act of Congress, some have suggested that the same is true also of customary international law. There is no authority for that view. The status of customary international law in the law of the United States in relation to treaties or acts of Congress has not been authoritatively determined.<sup>33</sup> And, in principle, the argument for according customary law equal authority, and for applying the later-in-time rule to it as well, is not unpersuasive. In international law, customary law and treaties are of equal authority and the later in time will prevail in case of inconsistency, when the parties so intend.<sup>34</sup> The obligations of the United States under customary law are of the same status as its treaty obli-

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33. *The Paquete Habana*, 175 U.S. 677, 708 (1900). Some have interpreted the language in *The Paquete Habana* as implying that the courts will not apply customary law if there is legislation on the subject, even if the legislation predates such customary law. The Supreme Court did not face that issue and surely did not offer a considered judgment on it. Even taking the Court's language seriously, it prescribes no such principle and may even suggest the contrary. Justice Gray said that courts will look to customary law "in the absence of any treaty or other public act of their own government in relation to the matter." 175 U.S. at 708. I have read that to mean "in the absence of any *supervening* treaty or other public act." Gray was addressing the established law of nations, and particularly the law of prize, which antedated Congress and congressional legislation; as to these, any act of Congress would be later-in-time. Gray was *not* addressing the possibility of principles that might be newly developed and that might conflict with an earlier congressional disposition. Earlier in the opinion, Gray said that courts will look to customary law "where there is no treaty, and no *controlling* executive or legislative act or judicial decision." 175 U.S. at 700 (emphasis added). The language suggests that it is not the existence of a legislative act, but of a *controlling* legislative act that would preclude application of customary law; an act of Congress might not be deemed controlling if it was enacted before the practice of States hardened into customary law.

34. There is a presumption of interpretation against repeal of custom by treaty or of treaty by custom, but clear evidence that the parties so intended will be given effect. See Akehurst, *The Hierarchy of the Sources of International Law, 1974-1975* BRIT. Y.B. INTL. L. 273, 275-76. Supervening customary law has been held to supersede rights and obligations under the 1958 Conventions on the Law of the Sea. Except in that they accepted the doctrine of the continental shelf, the 1958 Conventions essentially codified the traditional law of the sea, providing for large freedoms on the high seas subject only to a narrow territorial sea. During the following twenty years, and while the UN Conference on the Law of the Sea was in progress, states, including the United States, began to accept changes previously resisted. See, e.g., The Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1801 (1982). These changes, reflected in the 1982 Convention, included a wider territorial sea, transit passage (rather than merely "innocent" passage) through international straits, a very wide continental shelf, and a 200-mile exclusive economic zone. It is increasingly accepted that these changes have become customary law, and *pro tanto* supersede the different dispositions of the 1958 Conventions. See RESTATEMENT (REVISED), *supra* note 22, Introductory Note to Part V, at 55-56 (Tent. Draft No. 3, 1982). The United States, although a party to the 1958 Conventions (and despite its failure to sign the 1982 Convention), in effect agreed to abide by that customary law (as reflected in the 1982 Convention), rather than by the 1958 Conventions when it proclaimed its exclusive economic zone. See Proclamation No. 5030, 3 C.F.R. 22 (1983), reprinted in 16 U.S.C.A. § 1453 app. at 203-04 (West Supp. 1984); United States Oceans Policy, Statement by the President, 19 WEEKLY COMP. PRES. DOC. 383-84 (Mar. 14, 1983). For the United States, customary law may also effectively modify U.S. legislation, including the Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1801 (1982), the Outer Continental Shelf Lands Act of 1976, 43 U.S.C. § 1331 (1982), and numerous statutes that refer to waters under U.S. jurisdiction, which are now substantially extended. That the 1958 Conventions themselves largely codified customary law made it easier to find an intent to supersede the Conventions by change in custom.

Compare the cases where subsequent practice between the parties to a treaty was held to have modified the treaty by tacit consent. See, e.g., *United States v. France*, 3 INTL. LEGAL MATERIALS 668 (1964), *digested in* 58 AM. J. INTL. L. 1016, 1023-27 (1964). The need for clear

gations; for the United States in its relations with other nations a later principle of customary law would supersede a treaty obligation if so intended. In U.S. law, both treaties and customary law are law of the United States just as statutes are; like statutes, both are superior to state law. Treaties, it is established, are equal in status to statutes, and subject to the later-in-time principle; why should customary international law be of lower status? That U.S. courts cannot make domestic law inconsistent with an earlier act of Congress is not dispositive and may not even be relevant; customary law is not law made by U.S. judges or any other judges. Customary law is a multilateral international creation, made by the political processes of States, including the United States. It is akin to multilateral treaties, and some indeed see it as the result of tacit international agreement.<sup>35</sup> Judges who determine and interpret the law do so much as they would an unwritten international treaty. There seems to be no authority in jurisprudence, nor any reason in principle, for giving customary law less weight than a treaty in relation to an earlier act of Congress.

To some extent, the view that customary international law is inferior to treaties and to acts of Congress relies on the differences in their creation. Treaties are made by the President and Senate, but the Senate has no role in making customary law. There is reluctance to give status as law to practices of a single individual, the President, in which Congress did not have any part. But law is made by the President alone when he makes an executive agreement under his constitutional authority.<sup>36</sup> In any event, our jurisprudence from the beginning accepted customary law as law although it had been "legislated" before there was a Congress or a President, content to rely on the authority and the safeguards of the complex multinational process by which such law is made.

Much is made also of the fact that, unlike treaties, customary law is not mentioned expressly in the Supremacy Clause or in the constitutional list-

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intent by the parties to have custom supersede a treaty is particularly strong in respect of a bilateral treaty.

In a number of countries — Belgium, France, Luxembourg, and the Netherlands — treaties prevail over inconsistent statutes even when the treaties are earlier in time. In Italy and Germany, customary international law takes precedence over domestic law even if the latter is later in time. See Sasse, *The Common Market: Between International and Municipal Law*, 75 YALE L.J. 695, 742-53 (1966).

35. See Akehurst, *supra* note 34, at 275 n.5.

36. *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937). Whether an executive agreement on the President's own constitutional authority would be given effect in the face of an earlier statute has never been determined. It remains a hypothetical issue as no such conflict has yet arisen. The President's case would be strong where the executive agreement dealt with a matter over which his constitutional authority was clear and dominant, for example diplomatic relations or the command of the armed forces. For the view that a presidential agreement should not prevail in a case involving an agreement regulating trade (where congressional authority is clear and dominant), see *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 659-60 (4th Cir. 1953) (Parker, J.), *affid. on other grounds*, 348 U.S. 296 (1955). But see L. HENKIN, *supra* note 29, at 185-87.

Under the Constitution, even treaties that are expressly given status as law can be said to be made by the President alone, with the Senate not a co-participant but only a "brake." It is the President who "shall have Power . . . to make Treaties," provided the Senate concurs. U.S. CONST. art. II, § 2.

ing of U.S. law in article III. I do not consider that omission significant for our purposes. The Supremacy Clause was addressed to the states, and was designed to assure federal supremacy. The federal law whose binding quality was mentioned in the Supremacy Clause included the Constitution and the laws and treaties made under the authority of the United States — acts taken under the authority of the new United States Government, authority which had to be impressed on the states and on state courts. The law of nations of the time was not seen as something imposed on the states by the new U.S. government; it had been binding on and accepted by the states before the U.S. government was even established. It was “supreme” over federal as well as state laws, and binding on federal as well as state courts. There was no fear that the states would flout it, and therefore no need to stress its supremacy. In any event, today it is established that customary international law, as incorporated into U.S. law, fits comfortably into the phrase “the laws of the United States” for purposes of supremacy to state law. We have also accepted customary international law as “laws of the United States” for purposes of article III. Indeed, it is only by including international law in “laws of the United States” that one can find a firm basis for the supremacy of federal interpretations of international law, or for federal jurisdiction over cases arising under international law.<sup>37</sup> Is there any basis for finding parity and applying the later-in-time principle between some “laws of the United States” but not others?

The process by which customary law is created is hardly certain and remains somewhat mysterious. Courts are often reluctant to conclude that a principle has become customary law, and they may be even more reluctant to do so when the principle would be contrary to earlier congressional legislation. But where the existence of the principle is clear, and the world, including the United States, is living by it,<sup>38</sup> there seems to be no compelling reason to require courts to treat it as lesser law and to refuse to give it effect until Congress repeals the earlier statutory provision.

It is not that international law is superior to an act of Congress; in U.S. law, this is not true. But customary law is “self-executing,” and like a self-executing treaty it is equal in authority to an act of Congress for domestic purposes. An old act of Congress need not stand in the way of U.S. participation in the development of customary law and courts need not wait to give effect to that development until Congress repeals the older statute. As with respect to a treaty, Congress can at any time legislate to supersede the development for purposes of domestic law.

The view suggested here is not novel. Although the issue has not arisen and is still hypothetical, I think it has been the assumption of our jurisprudence from the beginning, as some scholars recognized long ago.<sup>39</sup> Con-

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37. See text preceding note 22 *supra*.

38. No principle could become binding on the United States without its consent or acquiescence, since a State is not subject to a principle of customary law if it rejected that principle during the process of its development. See RESTATEMENT (REVISED), *supra* note 22, § 102 comment d (Tent. Draft No. 1, 1980).

39. See, e.g., Oppenheim, *Introduction*, to C. PICCIOTTO, *THE RELATION OF INTERNATIONAL LAW TO THE LAW OF ENGLAND AND OF THE UNITED STATES OF AMERICA* 12 (1915); Potter, *Relative Authority of International Law and National Law in the United States*, 19 AM. J. INTL. L. 315 (1925).

gress itself on several occasions agreed that courts should give effect to customary law, in the face of earlier legislative dispositions.<sup>40</sup>

### III. PRESIDENTIAL VIOLATION OF INTERNATIONAL LAW

A different issue related to the status of international law in the law of the United States recurs whenever the United States acts in ways questionable under international law. In our time, from Vietnam to Grenada, and in Cuba, the Dominican Republic, El Salvador, and Nicaragua, there have been charges — including some that are plausible, some compelling — that the United States was acting in violation of international law. As is “natural” in our society, those offended by an alleged violation have sought relief in the courts. Their argument has been that since international law is part of the law of the United States it is within the constitutional duty of the President to “take Care that the Laws be faithfully executed” (article II, section 3), and that that duty should be enforced by the courts.<sup>41</sup>

There can be little doubt that the President has the duty, as well as the authority, to take care that international law, as part of the law of the United States, is faithfully executed. The President does that regularly when he assures respect, say, for the immunities of diplomats, or enforces a judgment of a court giving effect to the immunity of a foreign state. But he does not enforce international law when it is not controlling as law in the United States. For example, when Congress has enacted a statute inconsistent with a provision in an earlier treaty of the United States, the President (like the courts) will enforce the statute, although in doing so he is not faithfully executing but indeed violating international law. Less well recognized than the power of Congress is a parallel, independent power of the Presi-

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40. Early in our history Congress authorized the courts to consider certain claims and decide upon their validity “according to the rules of law, municipal and international, and the treaties of the United States.” Act of Jan. 20, 1885, ch. 25, § 3, 23 Stat. 283 (1885). In making such determinations the Court of Claims applied international law even in the face of an earlier statute. “It has been urged that a statute of the United States authorized resistance by our merchantmen to French visitation and search, to which there is the simple answer that no single state can change the law of nations by its municipal regulations.” *The Schooner Nancy*, 27 Ct. Cl. 99, 109 (1892); *see also* *Royal Holland Lloyd v. United States*, 73 Ct. Cl. 722, 736 (1931); *The Schooner Jane*, 37 Ct. Cl. 24, 29 (1901); *The Ship Rose*, 36 Ct. Cl. 290, 302 (1901). In *The La Ninfa*, 75 F. 513 (9th Cir. 1896), the court gave effect to the ruling of an international arbitration tribunal in the Behring Sea Controversy despite the fact that an earlier statute suggested a contrary position; the tribunal had been agreed to in a treaty and its decision later accepted by Congress. *Convention on the Behring Sea Arbitration*, Feb. 29, 1892, United States-Great Britain, art. I, 27 Stat. 947, 948, T.S. No. 140-41; Act of Apr. 6, 1894, ch. 57, 28 Stat. 52, *repealed by* Act of Feb. 26, 1944, ch. 65, § 18, 58 Stat. 100, 104 (*see also* 16 U.S.C. § 1151).

41. I do not address here several large but general questions: whether the President's duty to take care that the laws be faithfully executed is judicially enforceable at all, and if not, whether and in what circumstances it can be enforced by mandamus or injunction against lesser officials, *see Ex parte Young*, 209 U.S. 123 (1908); *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137 (1803); whether a challenge to an act of the United States under international law raises a nonjusticiable political question, *see Baker v. Carr*, 369 U.S. 186 (1962); *cf. Henkin, Is There A 'Political Question' Doctrine?*, 85 YALE L.J. 597 (1976) (suggesting that issues raised by the “political question” doctrine be analyzed under other, already established, doctrines); whether the Constitution applies abroad, *see RESTATEMENT (REVISED)*, *supra* note 22, § 721 comment b & reporters' note 2 (Tent. Draft No. 4, 1983); and, whether particular plaintiffs, such as members of Congress, have standing to challenge the alleged violations.

dent under the Constitution to act at times in disregard of the international obligations of the United States.

The responsibility of the President to take care that international law and U.S. treaties are faithfully executed derives from and depends on their status as law in the United States, a status derived from and dependent on their character as international obligations of the United States.<sup>42</sup> For example, if a treaty is void, or if it terminates, the treaty is not, or ceases to be, law in the United States. If, consistently with the terms of a treaty or where otherwise permitted by international law, the United States terminates or suspends a treaty's obligations, the obligation ceases to be law in the United States. If a treaty ceases to be law, there is, of course, neither duty nor authority to enforce it. And it is the President who, under the Constitution, has authority on behalf of the United States to terminate or suspend the treaty and thus to "repeal" it as law in the United States.<sup>43</sup>

Other consequences flow from the fact that the President wears more than one constitutional "hat," and that he has authority in foreign affairs and in relation to international law separate from and independent of his responsibility to enforce the international obligations of the United States as domestic law. For every State has the power — I do not say the legal right — to denounce or breach its treaties, or to violate obligations of customary international law. The Constitution does not allude to such power, but it is inconceivable that the Constitution intended to make it impossible or impermissible — unconstitutional — for the United States to violate a treaty or other international obligation. The power to do so was doubtless implied in the power to conduct our international relations, and, in general, it is the President who has that power on behalf of the United States. He can denounce a treaty when he deems it in the national interest to do so, even when such denunciation is a breach of international law. If he does so, the United States is responsible for the breach under international law, but the treaty is dead for the United States and is no longer law in the United States.

Similarly, although both Congress and the President have the duty and authority to carry out the international obligations of the United States, both may take actions within their respective constitutional powers regardless of U.S. obligations under international law. It is established that Congress, in legislating under its constitutional powers, can enact law inconsistent with an international agreement or other international obligation of the United States, thereby causing the United States to be in violation of that agreement or obligation. Similarly, the President, as the principal organ of the United States in foreign affairs, may make decisions within his constitutional authority that put the United States in violation of international law. Since neither Congress nor the President is constitutionally denied the authority to make decisions in disregard of international law, the courts will not require either the President or Congress to observe international law, nor will the courts invalidate such acts on the ground that

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42. See RESTATEMENT (REVISED), *supra* note 22, § 131 comment b (Tent. Draft No. 1, 1980).

43. See, e.g., *Charlton v. Kelly*, 229 U.S. 447, 476 (1913); RESTATEMENT (REVISED), *supra* note 22, § 352 (Tent. Draft No. 1, 1980).

they violate international law or a treaty of the United States.<sup>44</sup>

In sum, the courts will enforce principles of international law and self-executing obligations of U.S. treaties and will require officials, federal and state, to comply with them. But the President, in his constitutional capacity to act in foreign affairs, has power under the Constitution to denounce a treaty, effectively terminating the status of that treaty as law in the United States, even if such denunciation is in violation of international law. Similarly, the President, at least by formal official act, can take measures within his constitutional authority that are contrary to a treaty or a principle of customary law. The courts will not enjoin such acts to give effect to or to compel compliance with international law.<sup>45</sup>

### CONCLUSION

That international law is part of the law of the United States is asserted and accepted today as it was at our national beginnings. But nations, and the law of nations, and the United States and its place among nations, are different today; the nominal continuity in our jurisprudence masks radical development, much of it in our time. It is right that the law of nations, which is the responsibility of the U.S. nation, should be seen as incorporated in our national jurisprudence as national (federal) law. It seems right that courts of the United States should not assert a final say as to how the nation shall behave in respect of its obligations to other nations, and should not command Congress or the President to comply with international norms. For me, it seems right too that the courts should continue to give effect to developments in international law to which the United States is party, unless Congress is moved to reject them as domestic law in the United States.

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44. The rule may be different in respect of the few principles of customary law or provisions of multilateral treaties that recognize rights for private persons, notably human rights. See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); RESTATEMENT (REVISED), *supra* note 22, §§ 701-703 (Tent. Draft No. 3, 1982). Those principles or treaty provisions are essentially for the benefit of individuals, principally a State's own inhabitants. They do not directly implicate the State's foreign relations; in the United States the President's foreign affairs power should not warrant his violation of such rights. (Generally such violation would also run afoul of the U.S. Constitution.) Occasionally, the President may seek to deny rights to nationals of a foreign state in retaliation for an offense to the United States, but to the extent that international law forbids such measures when they violate important human rights, the President ought not to be free to take those measures. Cf. RESTATEMENT (REVISED), *supra* note 22, § 905 comment h & reporters' note 8 (Tent. Draft No. 5, 1984).

45. See, e.g., *Tag v. Rogers*, 267 F.2d 664 (D.C. Cir. 1959), *cert. denied*, 362 U.S. 904 (1960); *The Over the Top*, 5 F.2d 838 (D. Conn. 1925). In the cases growing out of U.S. hostilities in Vietnam, the courts gave no heed to arguments that the U.S. action violated international law. See, e.g., *United States v. Mitchell*, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967); cf. *United States v. Mitchell*, 386 U.S. 972 (1967) (Douglas, J., dissenting from denial of certiorari); see generally RESTATEMENT (REVISED), *supra* note 22, § 131 reporters' note 5 (Tent. Draft No. 1, 1980).