

January 2011

## Challenging History: The Role of International Law in the U.S. Legal System

Dinah Shelton

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

---

### Recommended Citation

Dinah Shelton, Challenging History: The Role of International Law in the U.S. Legal System, 40 Denv. J. Int'l L. & Pol'y 1 (2011).

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [digitalcommons@du.edu](mailto:digitalcommons@du.edu).

---

## Challenging History: The Role of International Law in the U.S. Legal System

### Keywords

History, International Law: History, Constitutional Law, Presidency, Religion, Judiciary

**CHALLENGING HISTORY:  
THE ROLE OF INTERNATIONAL LAW IN THE  
U.S. LEGAL SYSTEM**

DINAH SHELTON\*

It is a privilege to participate in honoring the great scholar, teacher, and friend Professor Ved Nanda. Under Professor Nanda's leadership, the University of Denver has developed a program that is recognized as a major contributor to many subject areas of international law: human rights, economic development, and international environmental law to mention just a few. Professor Nanda's own scholarship is always on the cutting edge, helping to define the international agenda and tell us what we will be thinking a year from now.

Professor Nanda has also provided long and invaluable service to the American Society of International Law. He chaired the 75th annual program committee and served on the executive council, research projects and committees. Most memorably, together with Professor James Nafziger, we wrote a Jessup moot court problem addressing the international protection of cultural property based in part on the still unresolved dispute over the Elgin or Parthenon Marbles.

Professor Nanda and his wife Katharine have also provided long and valued friendship. Whether consulting over an academic issue, providing hospitality in Denver, or driving through a snowstorm to spend time with a snowbound traveler at the old Stapleton airport, they have always supplied abundant kindness and generous support.

This contribution in honor of Professor Nanda, based on the 2011 Myers McDougal lecture, examines the place of international law in the United States legal system, its importance in the past, and its diminishing role today. The conclusion argues for continuing to apply the legal precedents that give effect to international law as a part of U.S. law, in our national interest and as intended by the authors of the Constitution.

---

\* Manatt/Ahn Professor of Law, The George Washington University Law School. This contribution is a revision of the McDougal Lecture delivered at the University of Denver, Sturm College of Law on February 27, 2011.

## 1. AT THE ORIGIN

While accepting that the Constitution is a living instrument and must be applied as such, the original text and writings contemporaneous with its drafting are the critical starting point to understanding our legal system and how it was intended to function. The place of international law begins with Article VI of the Constitution:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>1</sup>

The importance of Article VI and other references to international law were discussed by the constitutional drafters in the *Federalist Papers*.<sup>2</sup> These writings enhance our knowledge of the original understanding of the role of international law in the U.S. legal system, in some instances providing a stark contrast with current attitudes.

John Jay, Supreme Court Justice and negotiator of the Treaty of Paris that legally settled U.S. independence from Great Britain, wrote in the third Federalist Paper that:

The *just* causes of war, for the most part, arise either from violations of treaties or from direct violence.

It is of high importance to the peace of America that she observe the laws of nations towards all [foreign] powers, and to me it appears evident that this will be more perfectly and punctually done by one national government than it could be either by thirteen separate States or by three or four distinct confederacies. . . .

Because, under the national government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense and executed in the same manner. . . .<sup>3</sup>

Madison added that “[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations.”<sup>4</sup>

1. U.S. CONST. art. VI, cl. 2.

2. ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, *THE FEDERALIST: OR, THE NEW CONSTITUTION* (Max Beloff ed., Basil Blackwell 2d ed. 1987).

3. *THE FEDERALIST* NO. 3, at 10 (John Jay) (Max Beloff ed., Basil Blackwell 2d ed. 1987).

4. *THE FEDERALIST* NO. 42, at 212 (James Madison) (Max Beloff ed., Basil Blackwell 2d ed. 1987).

Hamilton and Madison thereafter spoke to the qualifications to be desired for those elected to Congress:

No man can be a competent legislator who does not add to an upright intention and a sound judgment a certain degree of knowledge of the subjects on which he is to legislate. . . .

. . . .

. . . . A branch of knowledge which belongs to the acquirements of a federal representative . . . is that of foreign affairs. In regulating our own commerce, he ought to be not only acquainted with the treaties between the United States and other nations, but also with the commercial policy and laws of other nations. He ought not to be altogether ignorant of the law of nations . . .<sup>5</sup>

An attention to the judgment of other nations is important to every government for two reasons: the one is, that, independently of the merits of any particular plan or measure, it is desirable, on various accounts, that it should appear to other nations as the offspring of a wise and honorable policy; the second is, that in doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed. What has not America lost by her want of character with foreign nations; and how many efforts and follies would she not have avoided, if the justice and propriety of her measures had, in every instance, been previously tried by the light in which they would probably appear to the unbiased part of mankind.<sup>6</sup>

Jay then returned to speak of presidential powers, including the treaty-making power, and the role of treaties in the U.S. legal system:

Some are displeased with [the treaty-making power], not on account of any errors or defects in it, but because, as the treaties, when made, *are to have the force of laws*, they should be made only by men invested with legislative authority. These gentlemen seem not to consider that the judgments of our courts, and the commissions constitutionally given by our governor, are as valid and as binding on all persons whom they concern, as the laws passed by our legislature. All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they

---

5. THE FEDERALIST NO. 53, at 275-76 (Alexander Hamilton or James Madison) (Max Beloff ed., Basil Blackwell 2d ed. 1987).

6. THE FEDERALIST NO. 63, at 321 (Alexander Hamilton or James Madison) (Max Beloff ed., Basil Blackwell 2d ed. 1987).

proceeded from the legislature . . . . It surely does not follow, that because they have given the power of making laws to the legislature, that therefore they should likewise give them power to do every other act of sovereignty by *which the citizens are to be bound and affected*.

Others, though content that treaties should be made in the mode proposed, are averse to their being the *supreme* laws of the land. They insist, and profess to believe, that treaties like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it. They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them.<sup>7</sup>

Finally, Hamilton spoke on the obligations of the federal judiciary:

The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquility.<sup>8</sup>

These writings clearly suggest an awareness of the importance of respecting international law and giving it effect in our legal system. Official acts followed along the same lines, especially regarding customary international law or the law of nations, as it was then known. U.S. Attorney General Randolph, a member of the

---

7. THE FEDERALIST NO. 64, at 331-32 (John Jay) (Max Beloff ed., Basil Blackwell 2d ed. 1987) (emphasis added).

8. THE FEDERALIST NO. 80, at 406-07 (Alexander Hamilton) (Max Beloff ed., Basil Blackwell 2d ed. 1987).

Constitutional Convention, issued an opinion on this matter because customary law was not addressed in the same detail in the Constitution, as were treaties.<sup>9</sup> Randolph stated officially that, “The law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation, subject to modifications on some points of indifference.”<sup>10</sup>

While the leaders in federal government were unanimous in their thinking, in practice, then as now, debates over international law were contentious, at least when the self-interest of various states or sectors of the public were involved. The first major incident occurred after George Washington sent John Jay to England to negotiate the terms of independence from Great Britain.<sup>11</sup> By February 1795, reports arrived that Jay had concluded the agreement and Washington convened a special session of Congress on June 8 of that year to debate approval of ratification. The treaty contained trade concessions and England consented to abandon forts on the Great Lakes, but other provisions, such as compensating loyalists for confiscated property, were less popular. Indeed, Washington tried to keep the terms of the treaty in, as he described it, “impenetrable secrecy” until June. The treaty passed with exactly two-thirds of the Senate voting in approval but before Washington could sign it, the text was leaked and uproar ensued. “By the July Fourth celebrations, Jay had been burned in effigy in so many towns that he declared he could have traversed the entire country by the glare of his own flaming figure.”<sup>12</sup> Jay was not the only one vilified: Hamilton had stones thrown at him when he spoke in favor of the treaty at a rally in New York. Opponents surrounded the presidential mansion, called for further war against England and cursed Washington. Washington likened the opposition to the ravings of a mad dog.<sup>13</sup>

A year after ratification of the peace treaty, the Supreme Court was called upon to decide whether the treaty would be enforced in the face of state legislation contrary to some of its provisions on property restitution. In *Ware v. Hylton*, the Court was clear:

---

9. *Who Privileged from Arrest*, 1 Op. Att’y Gen. 26, 27 (1792) (Randolph, Att’y Gen.). One may speculate that customary international law was more widely known and understood by the drafters than were treaties. See ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 1 (2d ed. 2007). Prior to the emergence of permanent international organizations in the twentieth century, multilateral treaties were almost unknown and most international law was developed through custom. *Id.*

10. *Who Privileged from Arrest*, *supra* note 9, at 27.

11. See RON CHERNOW, *WASHINGTON: A LIFE* 729-32 (2010) (this description of events is based on a more detailed discussion in the text).

12. *Id.* at 731.

13. *Id.* at 732.

A treaty cannot be the Supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way. If the Constitution of a State (which is the fundamental law of the State, and paramount to its Legislature) must give way to a treaty, and fall before it; can it be questioned, whether the less power, an act of the State Legislature, must not be prostrate? It is the declared will of the people of the United States that every treaty made, by the authority of the United States, shall be superior to the Constitution and laws of any individual State; and their will alone is to decide . . . .

. . . [I]t is the declared duty of the State Judges to determine any Constitution, or laws of any State, contrary to the treaty (or any other) made under the authority of the United States, null and void. National or Federal Judges are bound by duty and oath to the same conduct.<sup>14</sup>

The founding period saw some of our most outstanding jurists on the Supreme Court. According to David McCullough's masterful biography of John Adams, the second president called his proudest appointment that of John Marshall to be Chief Justice of the United States.<sup>15</sup> In making the appointment, Adams paid his highest compliments to Marshall: he described the jurist as "plain . . . sensible . . . cautious, and learned in the law of nations."<sup>16</sup> Marshall proved to be all of those, and his legacies remain with us, in particular his knowledge and use of the law of nations. He is particularly cited for two landmark doctrines concerning international law: the *Charming Betsy* rule of construction and the doctrine of self-executing treaties.<sup>17</sup>

In the matter of *Alexander Murray v. Schooner Charming Betsy*, a case concerning neutral shipping, Marshall commented that the parties had observed during the litigation "that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ." <sup>18</sup> According to Marshall, the principle cited was correct and "ought to be kept in view in construing the act now

14. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236-37 (1796).

15. DAVID MCCULLOUGH, JOHN ADAMS illus. 55 (2002) (noted in caption).

16. *Id.* (internal quotation marks omitted).

17. Curtis A. Bradley, *The Charming Betsy Cannon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 486 (1998) (explaining John Marshall's role in developing the *Charming Betsy* rule); David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 147 (1999) (explaining John Marshall's role in developing the doctrine of self-executing treaties).

18. *Alexander Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).



under consideration.”<sup>19</sup> The *Charming Betsy* has provided a canon of statutory construction for over two hundred years, ensuring that legislation is interpreted where possible to conform to obligations under international law unless Congress unmistakably dictates otherwise.<sup>20</sup>

The doctrine of self-executing treaties emerged in the case of *Foster and Elam v. Neilson*. Appellants sued to recover land that they claimed under a Spanish land grant, in reliance on a treaty concluded in 1819 between the United States and Spain. The treaty provided that

all the grants of land made before the 24th of January 1818, by his Catholic majesty, or by his lawful authorities, in the said territories ceded by his majesty to the United States, shall be ratified and confirmed to the persons in possessions of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic majesty.<sup>21</sup>

The Court held that the treaty did not in and of itself operate to ratify or confirm the appellants’ title. Marshall, writing for the court, articulated the doctrine of self-executing treaties, noting the general view that, “A treaty is in its nature a contract between two nations, not a legislative act.” Therefore, it “is carried into execution by the sovereign power of the respective parties to the instrument.”<sup>22</sup> He went on to add:

In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an an [sic] act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.<sup>23</sup>

Marshall looked to the language of the treaty, which, he noted, did not say that the land grants “are hereby confirmed.”<sup>24</sup> Had such been its language, it would have acted directly on the subject, and would

---

19. *Id.*

20. *See, e.g.,* United States of America v. The Palestine Liberation Organization, 695 F. Supp. 1456 (S.D.N.Y. 1988) (interpreting the Anti-terrorism Act of 1987 to conform to the United Nations Headquarters Agreement).

21. James Foster and Pleasants Elam v. David Nelson, 27 U.S. (2 Pet.) 253, 310 (1829).

22. *Id.* at 254.

23. *Nelson*, 27 U.S. at 254.

24. *Id.*

have repealed those acts of Congress that were repugnant to it. Use of the future tense, "shall be ratified" indicated that something more had to be done by the legislature.

Herein follows a lesson for all law students, lawyers and judges. Several years later, another land grant case involving the same treaty, *United States v. Percheman*, came before the Supreme Court.<sup>25</sup> The lawyers presented new evidence, with decisive results. As Marshall describes the matter:

The treaty was drawn up in the Spanish as well as in the English languages; both are originals, and were, unquestionably, intended by the parties to be identical; the Spanish has been translated; and it is now understood, that the article expressed in that language is, that 'grants shall remain ratified and confirmed to the persons in possession of them, to the same extent,' &c., thus conforming exactly so the universally received law of nations.<sup>26</sup>

Here Marshall noted that although the words "shall be ratified and confirmed" could be viewed as words of contract, stipulating some future legislative act, they did not have to be read that way:

. . . [T]hey may import that they "shall be ratified and confirmed" by force of the instrument itself. When it is observed, that in the counterpart of the same treaty, executed at the same time, by the same parties, they are used in this sense, the construction is proper, if not unavoidable.

In the case of *Foster v. Elam*, 2 Peters, 253, this court considered those words importing a contract; the Spanish part of the treaty was not then brought into our view, and it was then supposed, that there was even a formal difference of expression in the same instrument, drawn up in the language of each party. Had this circumstance been known, it is believed, it would have produced the construction which is now give to the article.<sup>27</sup>

As this very summary review of some of the early writings and jurisprudence of the United States indicates, the law of nations and treaty obligations of the country were deemed an important part of the law during the early decades following independence. There was a justifiable fear of the costs and consequences of war. The country was young and relatively weak. It depended for its very existence on respect

---

25. *United States v. Juan Percheman*, 32 U.S. 51 (1833).

26. *Id.* at 52.

27. *Id.* at 52.

for international law, the recognition of other nations, and their willingness to engage in trade with the new country.

## II. THE MODERN CHALLENGES

In the two centuries since the United States became an independent nation, the government has concluded hundreds of bilateral and multilateral agreements deemed to be in the national interest. It has also demanded respect for the law of nations, now known as customary international law, and enforced it domestically. As in the early days of the republic, however, challenges are often mounted when local interests are seen as affected adversely.

Today, Marshall's legacy is being questioned. A portrait of him in a respected law school's moot court room omits the treaty clause from the text of Article VI that he is shown carrying. Some courts are questioning the constitutional doctrines Marshall formulated and which have not only served this nation well for two centuries, but have become judicial doctrine in many other countries applying international law in their domestic legal systems. In *Capitol Records, Inc. v. Thomas*,<sup>28</sup> a district judge declined to give effect to the *Charming Betsy* rule to reconcile the Copyright Act<sup>29</sup> with the World Intellectual Property Organization ("WIPO") Copyright Treaty ("WCT") and the WIPO Performances and Phonograms Treaty ("WPPT").<sup>30</sup> This was despite the evidence that former Presidents, Congress, and the Register of Copyrights have consistently suggested that the Copyright Act implements the WIPO right in question. In *Sampson v. Federal Republic of Germany*, the Seventh Circuit further diminished the *Charming Betsy* canon of interpretation.<sup>31</sup> The Court noted that while international law is "part of our law," it does not follow that federal statutes must be read to reflect the norms of customary international law.<sup>32</sup> In *Medellín v. Texas*,<sup>33</sup> discussed further below, the Supreme Court seemed to suggest, contrary to *Foster v. Elam*, that treaties are presumptively *not* self-executing.<sup>34</sup>

In practice, international obligations are sometimes violated at the local level out of lack of knowledge about those obligations. The Vienna Convention on Consular Relations<sup>35</sup> and its Optional Protocol

---

28. *Capitol Records Inc. v. Jammie Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008).

29. *Id.* at 1226.

30. *Id.* at 1210.

31. *Jacob Sampson v. Federal Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001).

32. *Id.* at 1152.

33. *Medellín v. Texas*, 552 U.S. 491 (2008).

34. *Id.* at 491-92.

35. Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

Concerning the Compulsory Settlement of Disputes,<sup>36</sup> to which the U.S. is a contracting party, requires notification of consular officials whenever a national of one party is detained by officials of another country and also specifies that detainees be informed of their right to consular assistance. Many local police have been unaware of these treaty obligations.

On June 29, 1993, Texas law enforcement authorities arrested José Ernesto Medellín, 18 years old at the time, in connection with the murders of two young women in Houston, Texas. Mr. Medellín told the arresting officers that he was born in Mexico, and informed Harris County Pretrial Services that he was not a United States citizen, but rather a Mexican national.

Despite the U.S. treaty obligations, Mr. Medellín was not advised of his right to seek assistance from the Mexican consul, nor was the Mexican consulate notified of his detention. Mr. Medellín claimed he was unaware of his right to seek consular assistance either before or during his capital trial. He was convicted of capital murder and sentenced to death. The Texas Court of Criminal Appeals affirmed his conviction and sentence.<sup>37</sup>

One month later, Mexican consular authorities learned of Mr. Medellín's detention for the first time when he wrote to them from death row. They promptly began rendering him assistance.<sup>38</sup> On March 26, 1998, Medellín filed a state application for a writ of *habeas corpus* arguing, among other things, that his conviction and sentence should be vacated as a remedy for the violation of his consular rights. The trial court denied relief and the Texas Court of Criminal Appeals affirmed.<sup>39</sup>

Mr. Medellín then turned to the federal courts. He filed a petition for a writ of *habeas corpus* in the United States District Court for the Southern District of Texas, which was denied,<sup>40</sup> and appealed. While his appeal was pending before the Fifth Circuit, the International Court of Justice decided the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*.<sup>41</sup> In *Avena*, the ICJ held that the United States was required to give review and reconsideration to the convictions and sentences of 51 Mexican nationals, including Mr. Medellín, whose rights under the Vienna Convention on Consular

---

36. Vienna Convention on Consular Relations and Optional Protocol Concerning the Compulsory Settlement of Disputes, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820.

37. Medellín v. State, No. 71, 997 (Tex. Crim. App. Mar. 19, 1997) (unpublished).

38. Brief for Petitioner at 7, Medellín v. Texas, 552 U.S. 491 (2008) (No. 06-984).

39. Application for Writ of Habeas Corpus in *Ex parte Medellín*, No. 675430-A (Tex. Crim. App.).

40. Medellín v. Cockrell, Civ. Action No. H-01-4078 \*28 (SD Tex., June 25, 2003).

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

Relations had been violated.<sup>42</sup> Although the effect of the *Avena* judgment had not been briefed or argued, the Fifth Circuit held that the Vienna Convention was not judicially enforceable.<sup>43</sup> Mr. Medellín petitioned for certiorari on the question of the effect of the *Avena* judgment in the cases of Mexican nationals whose rights the ICJ adjudicated in *Avena*.

On December 10, 2004, the United States Supreme Court granted Mr. Medellín a writ of certiorari<sup>44</sup> to decide whether, under the Supremacy Clause of the Constitution, courts in the United States must give effect to the United States' treaty obligation to comply with the ICJ judgment in *Avena*. While the case was pending before the Supreme Court, the President of the United States announced that the United States would "hav[e] State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision."<sup>45</sup> The President also decided to denounce the Optional Protocol giving the ICJ jurisdiction over cases involving the Consular Relations Convention, something permitted by the terms of the treaty.<sup>46</sup>

Given the prospect that Mr. Medellín would obtain relief in the state court, the Supreme Court by a 5-4 vote dismissed the writ as improvidently granted.<sup>47</sup> On March 24, 2005, Mr. Medellín filed an application for post-conviction relief in the Texas Court of Criminal Appeals.<sup>48</sup> That court set the case for briefing and heard oral argument, at which the United States as *amicus curiae* supported Mr. Medellín's request for relief. On November 15, 2006, however, the Texas court denied relief, expressly holding that the President of the United States has no authority to enforce the undisputed treaty obligation of the United States to abide by the *Avena* judgment in the cases of the Mexican nationals addressed in that judgment.<sup>49</sup> Mr. Medellín again sought review by the U.S. Supreme Court, which ultimately held in favor of Texas. The state of Texas executed Mr. Medellín on August 5, 2008.<sup>50</sup>

---

42. *Id.* at 60.

43. *Medellín v. Dretke*, 371 F.3d 270, 280 (5th Cir. 2004).

44. *Medellín v. Dretke*, 543 U.S. 1032, 1032 (2004).

45. Memorandum from the President of the United States of America to the Att'y Gen. on Compliance With the Decision of the Int'l Court of Justice in *Avena* (28 February 2005), *available at*: <http://www.unhcr.org/refworld/docid/429c2fd94.html>.

46. *Id.*

47. *Medellín v. Dretke*, 544 U.S. 660, 667 (2005) (*per curiam*).

48. *Ex parte Medellín*, 223 S.W.3d 315, 321 (Tex. Crim. App. 2006).

49. *Id.* at 352.

50. DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/medellin-v-texas> (last visited Oct. 8, 2011).

In the meantime, the Oklahoma Court of Criminal Appeals came to a very different conclusion from that of the Texas courts. In *Osbaldo Torres v. The State of Oklahoma*, the court granted a stay of execution and remanded the case for an evidentiary hearing on whether the lack of consular assistance caused prejudice in the original criminal trial.<sup>51</sup> Justice Chapel explained the rationale for the order, quoting the Supremacy Clause:

There is no question that this Court is bound by the Vienna Convention and Optional Protocol. . . .The federal government's power to make treaties is independent of and superior to the power of the states. Every state or federal court considering the Vienna Convention, for any reason, has agreed that it is binding on all jurisdictions within the United States, individual states, districts and territories. Several courts have expressed concern that any failure of United States courts to abide by the Vienna Convention may have significant adverse consequences for United States citizens abroad. Treaty violations not only undermine the "Law of the Land," but also international law, where reciprocity is key. If American law enforcement officials disregard, or perhaps more accurately, remain unaware of the notification provision in Article 36, then officials of foreign signatories are likely to flout those obligations when they detain American citizens.

. . . The United States voluntarily and legally entered into a treaty, a contract with over 100 other countries. The United States is bound by the terms of the treaty and the State of Oklahoma is obligated by virtue of the Supremacy Clause to give effect to the treaty. As this Court is bound by the treaty itself, we are bound to give full faith and credit to the *Avena* decision.

. . . In order to give full effect to *Avena*, we are bound by its holding to review Torres's conviction and sentence in light of the Vienna Convention violation, without recourse to procedural bar. Common sense and fairness also suggest this result. Torres, like many foreign nationals, was unaware he had the right to contact his consulate after his arrest for murder. Torres's Vienna Convention claim was generated by the State of Oklahoma's initial failure to comply with a treaty. . . . [W]e cannot fulfill the goal of a fair and just review of

---

51. *Torres v. State*, No. PCD-04-442, 2004 WL 3711623, at \*1 (Okla. Crim. App., May 13, 2004).

Torres's case if we refuse to look at his Vienna Convention claims on the merits.<sup>52</sup>

The Oklahoma judgment seems more consistent with constitutional law than the approach of the Texas courts. However, it was not popular with many in the state. Following the *Torres* case, the state of Oklahoma presented to its voters in November 2010 a proposed state constitutional amendment.<sup>53</sup> Although, or perhaps because, the proposed text was not reproduced on the ballot, over 70 percent of voters approved it.<sup>54</sup> It would amend Article 7, section 1 of the Oklahoma constitution, instructing the state's courts when exercising their judicial authority to:

. . . uphold and adhere to the law as provided in the United States constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia law.<sup>55</sup>

There are considerable constitutional problems with this provision and on November 9, 2010, the Federal District Court for the Western District of Oklahoma entered a temporary restraining order, enjoining defendants from certifying the election results for State Question 755.<sup>56</sup> In the meantime, some dozen other states<sup>57</sup> have proposed legislation to effectuate similar prohibitions – despite the protests of businesses that will be unable to enforce bilateral investment agreements as a consequence. The laws will also preclude state courts from deciding on issues of Indian law, which are governed by more than 1400 treaties.

52. *Id.*, at \*2-4.

53. H.R.J. Res. 1056, 52d Leg., 2d Reg. Sess. (Okla. 2010), available at <https://www.sos.ok.gov/documents/questions/755.pdf>.

54. General Election Results 2010, OKLAHOMA STATE ELECTION BOARD (Nov. 2, 2010), <http://www.ok.gov/elections/support/10gen.html>.

55. H.R.J. Res. 1056, *supra* note 53, at § 1(c).

56. *Awad v. Zirriax*, No. CIV-10-1186-M (W.D. Okla. Nov. 9, 2010) (order granting temporary restraining order).

57. While most of the statutes address sharia law primarily, Louisiana passed in June 2010 a law against “international law” being used in its courts. LA. REV. STAT. ANN. § 9:6001 (2010). South Dakota’s House Joint Resolution 1004, says that no court “may apply international law, the law of any foreign nation, or any foreign religious or moral code with the force of law in the adjudication of any case under its jurisdiction.” H.R.J. Res. 1004, 86th Leg. Assemb. (S.D. 2011).

Oklahoma alone has 38 federally recognized tribes who are directly affected if the new provision goes into force.<sup>58</sup>

### III. WHY?

How can we understand this rejection of international norms that are only binding if the United States government has consented to them through the formation of customary international law or the drafting and ratification of treaties? As noted earlier, the United States was a small country that needed international law for its very existence at the beginning. Should becoming an international super-power produce a change in practice? Some officials and pundits argue U.S. exceptionalism – that being powerful gives the country a right to be exempt from rules that apply to others.<sup>59</sup> This is neither good law nor good policy as several examples demonstrate. International law is more important as a part of our legal system than it has been at any point in our history since the founding years.

As to why the challenges are occurring, the explanation may derive in part from the fact that the twentieth century saw vast and almost daily developments in international norms, institutions and procedures. The subject matters being regulated intrude into matters that would have been inconceivable to an eighteenth century agrarian society, when the city of New York had a total population of 10,000 people. Some of the matters dealt with internationally today were not even considered appropriate for federal action in the past.

Looking back, there was rarely, if ever, a period of such rapid global change as the twentieth century. From its beginning, the telegraph and telephone, followed by radio, aviation, and television made it possible to communicate and travel rapidly across borders. And it continues. Three decades ago, a secessionist group on the island of Bougainville faxed its declaration of independence to the central government. Today, revolutions are organized on Facebook and Twitter. The inherent attributes and potential reach of new technology necessitates global cooperation, leading to the formation of the first permanent international institutions.

Much of the resulting international regulation is taken for granted today, such as being able to pick up the telephone and directly call almost any place in the world or fly from one country to another with airlines often registered in different countries. The expansion of subject matter requiring international attention is vast: there are now treaties

---

58. *Federal and State Recognized Tribes*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/?tabid=13278#ok> (last updated May 2011).

59. See generally SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* (1997).



on cybercrime,<sup>60</sup> international adoption,<sup>61</sup> parental abduction of children,<sup>62</sup> and criminal cooperation.<sup>63</sup>

Despite this, we remain in the founding decades of many international institutions and of the efforts to regulate increasingly frequent and complex interactions of individuals, companies, and governments across borders. The difference today is that there is a broad legal framework on many transboundary issues; while lawmaking will of necessity continue as new problems arise, the emphasis has turned to compliance and enforcement.

The international legal system has necessarily changed when presented with each challenge or opportunity. The first decades of the United Nations system and regional organizations like the Council of Europe, the Organization of American States and the European Union were largely devoted to elaborating and giving effect to fundamental new principles in the aftermath of World War II. In particular, international organizations in the post-war period reflected an overwhelming consensus that henceforth human rights must be a matter of international concern and colonial territories must become free.

International organizations also became the venue for negotiating rules and regulations to govern a host of newly-emerging issues. When it became possible to exploit off-shore oil resources, an agreement had to be reached on whether or not a state's coastal jurisdiction should extend to its continental shelf or whether exploitation should be open to all states.<sup>64</sup> The launch of *Sputnik* required states to give thought to the legality of satellites passing overhead and to elaborate rules to govern activities in outer space;<sup>65</sup> the result has not only been an

---

60. See Budapest Convention on Cybercrime, Nov. 23, 2001, C.E.T.S. No. 185.

61. See Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134 (entered into force May 1, 1995).

62. See Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670.

63. See United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 95 (entered into force Nov. 11, 1990, U.N. Doc. E/Conf. 82/16, reprinted in 28 I.L.M. 493).

64. See Convention on the Continental Shelf, Apr. 29, 1958, 499 U.N.T.S. 311.

65. See Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (the "Outer Space Treaty"), Jan. 27, 1967, 610 U.N.T.S. 205 (adopted by the General Assembly in its resolution 2222 (XXI) and entered into force on 10 October 1967); Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (the "Rescue Agreement"), Apr. 22, 1968, 672 U.N.T.S. 119 (adopted by the General Assembly in its resolution 2345 (XXII) and entered into force on 3 December 1968); Convention on International Liability for Damage Caused by Space Objects (the "Liability Convention"), Mar. 29, 1972, 961 U.N.T.S. 187 (adopted by the General Assembly in its resolution 2777 (XXVI) and entered into force on 1 September 1972); Convention on Registration of Objects Launched into Outer Space (the "Registration

absence of subsequent conflict but a remarkable degree of international cooperation based on the agreements concluded in the 1960s.

Other challenges and opportunities face policy-makers and lawyers today, with inevitable consequences for our legal system.

*Migration and movement.* A recent survey of U.S. colleges revealed that among large universities, the University of Colorado has the highest number of Peace Corps volunteers (GWU is highest among medium sized schools).<sup>66</sup> These young persons give two years of their lives to contribute to the well-being of those living in other countries. During these two years, as the Oklahoma court in *Torres* indicated, they are entirely dependent on the rule of law for their well-being – not only the domestic law of the state where they are assigned, but the international rule of law. Without respect for the consular immunities treaty, they will lack the protection of the U.S. government in the event that they are injured, wrongfully arrested, or otherwise in harm's way. Tourists, business travelers and diplomats are also at risk. It will be difficult at best to insist that other countries respect the rights of U.S. nationals if the U.S. ignores the rights of foreign nationals.

A second emerging issue is the increasingly scarce and critical freshwater on which life depends. Freshwater is less than three percent of the total water on earth.<sup>67</sup> Much of it is frozen in ice, and the remainder is found almost entirely in some two hundred and sixty-one trans-boundary river systems and lakes, covering nearly half of the land-surface of the earth.<sup>68</sup> We share water systems with our neighboring states to the north and south, whose populations and economic activities compete to use the waters for drinking, sanitation, irrigation, and industrial activities. Canadian pollution enters the United States and the United States exports it in turn to Mexico. Around the globe, drought, desertification, pollution, and over-extraction lead to water shortages, tensions, and conflicts between states. Water wars are predicted unless agreements are made and upheld. The U.S. is fortunate to have a comprehensive Boundary

---

Convention"), Jan. 14, 1975, 1023 U.N.T.S. 15 (adopted by the General Assembly in its resolution 3235 (XXIX) and entered into force on 15 September 1976); Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (the "Moon Agreement"), Dec. 18, 1979, 1363 U.N.T.S. 3 (adopted by the General Assembly in its resolution 34/68 and entered into force on 11 July 1984). See also P.J. Blount, *Renovating Space: The Future of International Space Law*, in this book.

66. Philip P. DiStefano, *Chancellor's Letter: CU No. 1 in the Peace Corps*, COLORADO DAILY (Feb. 2, 2011, 3:34 PM), [http://www.coloradodaily.com/cu-boulder/ci\\_17273010#axzz1ZT0q8EwA](http://www.coloradodaily.com/cu-boulder/ci_17273010#axzz1ZT0q8EwA).

67. UNITED NATIONS ENV'T PROGRAMME, GLOBAL ENVIRONMENTAL OUTLOOK 3: PAST, PRESENT AND FUTURE PERSPECTIVES 150 (2002), available at [http://www.unep.org/geo/GEO3/english/pdfs/chapter2-5\\_Freshwater.pdf](http://www.unep.org/geo/GEO3/english/pdfs/chapter2-5_Freshwater.pdf).

68. See *id.*

Waters Agreement with Canada,<sup>69</sup> which has allowed us to avoid major disputes for nearly a century.

Biological resources underlay an estimated forty percent of the global economy.<sup>70</sup> Some eighty percent of all pharmaceuticals are based on plant genetic resources.<sup>71</sup> The cures for cancer, macular degeneration, and dengue fever may be found in rapidly disappearing forests where the uses of native plants are known only to indigenous people who are themselves disappearing, along with their cultures, languages and knowledge; over 1000 groups are predicted to disappear within the coming decades.<sup>72</sup> Species extinction is occurring at a rate estimated to be 1000 times the natural rate.<sup>73</sup> Of perhaps more immediate concern, more than half the world's commercial fish stocks have reached their yield limit and many fisheries are crashing, taking away the major protein source for nearly a billion people.<sup>74</sup>

Globally, nearly three billion people, or about half the world population, live on less than two dollars a day and one billion survive on less than two dollars and fifty cents a day.<sup>75</sup> The Gross Domestic Product of the poorest 48 nations is less than the combined wealth of the world's seven richest individuals.<sup>76</sup> In the developing world, one in five children every year do not live to see their fifth birthday.<sup>77</sup> In addition to the humanitarian disaster this poses, there is a proven

69. Treaty between the United States and Great Britain Relating to Boundary Waters between the United States and Canada, U.S.-Gr. Brit., Jan. 11, 1909, 36 Stat. 2448.

70. *Convention of Biological Diversity's Tenth Conference of the Parties (CBD COP 10)*, INT'L CENTRE FOR TRADE AND SUSTAINABLE DEV., <http://ictsd.org/i/events/dialogues/62258/> (last visited Sept. 29, 2011).

71. See generally *Biodiversity, Wild Species*, GLOBAL ENV'T, <http://www.admweb studios.co.uk/Biodiversity3.htm> (last visited Sept. 29, 2011).

72. See SECRETARIAT OF THE PERMANENT FORUM OF INDIGENOUS ISSUES, DEP'T OF ECON. & SOC. AFFAIRS, STATE OF THE WORLD'S INDIGENOUS PEOPLES 1 (2009), available at [http://www.un.org/esa/socdev/unpfii/documents/SOWIP\\_web.pdf](http://www.un.org/esa/socdev/unpfii/documents/SOWIP_web.pdf).

73. Press Release, Secretary General, With Biodiversity Loss Accelerating, 'We are Bankrupting Our Natural Economy' Says Secretary-General in Remarks at Event to Launch International Year, U.N. Press Release SG/SM/12739/ENV/DEV/1108/OBV/851 (Feb. 12, 2010), available at <http://www.un.org/News/Press/docs/2010/sgsm12739.doc.htm>.

74. FOA FISHERIES AND AQUACULTURE DEP'T, FOOD & AGRIC. ORG. OF THE UNITED NATIONS, THE STATE OF WORLD FISHERIES AND AQUACULTURE 3 (2010), available at <http://www.fao.org/docrep/013/i1820e/i1820e.pdf>; UNITED NATIONS ENV'T PROGRAMME, VITAL WATER GRAPHICS: AN OVERVIEW OF THE STATE OF THE WORLD'S FRESH AND MARINE WATER (2d ed. 2008), available at <http://www.unep.org/dewa/vitalwater/article164.html> (follow "Economic activities: Fisheries and ecotourism" Under Chapter 3; then follow "Fishing yield").

75. Anyp Shah, *Causes of Poverty*, GLOBAL ISSUES (Sep. 4, 2011), <http://www.globalissues.org/issue/2/causes-of-poverty>.

76. *Id.*

77. *Pollution in the Developing World*, BLACKSMITH INSTITUTE, available at <http://www.blacksmithinstitute.org/files/FileUpload/files/Additional%20Reports/hidden.pdf>.

correlation between poverty and armed conflict: of the 32 countries at the low end of the U.N.'s Human Development Index, 22 have experienced conflict at some point during the past 15 years,<sup>78</sup> including nine of the ten countries at the bottom of the list.<sup>79</sup>

The value of world merchandise exports was US \$12.15 trillion in 2009, while world commercial services exports came to US \$3.31 trillion.<sup>80</sup> The U.S. imports 13.6 percent of its goods and merchandise.<sup>81</sup> As of April 2010, average *daily* turnover in global foreign exchange markets was estimated at US \$4.0 trillion.<sup>82</sup> Some firms specializing on foreign exchange market had put the average daily turnover in excess of US \$4 trillion. Four years earlier the average global turnover totaled US \$3.3 trillion.<sup>83</sup>

Half of all revenues for Hollywood films now comes from abroad.<sup>84</sup> McDonald's has 14,000 restaurants in the United States but 17,000 in 117 other countries.<sup>85</sup> Ninety percent of the 1000 restaurants it opened in 2008 were outside the United States.<sup>86</sup> Boeing's 777 jet aircraft is assembled in Boeing's plant in Everett, Washington from a fuselage made in Japan, wingtips coming from Korea, rudders from Australia, dorsal fins from Brazil, the main landing gear from Canada and France, and flight computers from the United Kingdom.<sup>87</sup>

Two-thirds of all this trade is transported by sea, but products are not the only travelers.<sup>88</sup> According to the World Travel and Tourism Council, tourism and its related economic activities employ 200 million people, and transport nearly 700 million international travelers per

78. Human Development Report 2005: International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World, United Nations Development Programme, 12 (Charlotte Denn ed., 2005), [http://hdr.undp.org/en/media/HDR05\\_complete.pdf](http://hdr.undp.org/en/media/HDR05_complete.pdf).

79. *Id.* at 151.

80. *WTO Forecasts Global Trade Will Experience 9.5% Record Growth in 2010*, MERCOPRESS (March 27, 2010), <http://en.mercopress.com/2010/03/27/wto-forecasts-global-trade-will-experience-9.5-record-growth-in-2010>.

81. *U.S. Trade Deficit Narrows in July*, TRADING ECONOMICS (Sep. 8, 2011, 1:41 PM), <http://www.tradingeconomics.com/united-states/imports>.

82. *Triennial Central Bank Survey of Foreign Exchange and OTC Derivatives Market Activity in April 2010 – Preliminary Global Results – Turnover*, BANK FOR INTERNATIONAL SETTLEMENTS (Sep 1, 2010), <http://www.bis.org/press/p100901.htm>.

83. *Id.*

84. Sonia Kolesnikov-Jessop, *Hollywood Presses Its Global Agenda*, N.Y. TIMES (May 22, 2011), available at <http://www.nytimes.com/2011/05/23/business/media/23film-screensingapore.html?pagewanted=all>.

85. George F. Will, *Lovin' It All Over*, WASHINGTON POST, Dec. 27, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/26/AR2007122601485.html>.

86. *Id.*

87. FEDERAL AVIATION ADMINISTRATION, ASSESSMENT OF FAA'S RISK-BASED SYSTEM FOR OVERSEEING AIRCRAFT MANUFACTURER'S SUPPLIERS 3 (FEB. 26, 2008), available at <http://www.pogoarchives.org/m/tr/faa-supplier-20080226.pdf>.

88. *Id.*

year. This figure is expected to double by 2020.<sup>89</sup> Foreign visitors are the main source of foreign currency for more than one-third of all countries.<sup>90</sup> International telephone calls increased from 33 billion minutes in 1990 to 70 billion minutes in just six years' time.<sup>91</sup>

Criminal activities have gone international as well, including drug and human trafficking, illicit arms trade, stolen art and artifacts, illegal wildlife trade, dumping of hazardous or toxic products and waste, currency counterfeiting and money laundering, and high tech crime.<sup>92</sup> Just one international investment fraud case involved more than 2,000 victims from 60 countries who were defrauded of approximately US \$200 million.<sup>93</sup> On Sept. 3, 1998, law enforcement agents in 32 U.S. cities and Australia, Austria, Belgium, Finland, France, Germany, Italy, Netherlands, Norway, Portugal, Spain, and Sweden raided the homes of suspected internet child pornographers.<sup>94</sup> Cooperative transnational law-making and enforcement is increasing in recognition of the fact that law enforcement will not be effective without such agreements and cooperation.

Finally, since 1990, more than three million people have died in armed conflicts and about 25 million people are currently internally displaced because of conflicts or human rights violations.<sup>95</sup> Notably, at the beginning of the 1991 Gulf War, the first reservists called up were six lawyers of the 46th International Law Detachment.<sup>96</sup>

In sum, almost no topic in the professional life of a lawyer remains exclusively regulated by domestic law. The reality is that no country is capable of defending itself and ensuring the welfare of its citizens without international cooperation and the rule of law. In 1946, Hersch Lauterpacht, looking back at the work of one of the founders of international law, Hugo Grotius, commented that even in the 17th

89. Russell A. Mittermeier, *Forward to Costas Christ ET AL.*, *Tourism & Biodiversity: Mapping Tourism's Global Footprint* at v (2003), available at <http://www.unep.fr/shared/publications/pdf/WEBx0016xPA-TourismFootprint.pdf>.

90. *Id.*

91. Press Release, Geneva Press Kit, Statistical Snapshot of Soc. Dev., U.N. Press Release 8 - DPI/2117 (June 26-30, 2000), available at <http://www.un.org/esa/socdev/geneva2000/text-version/news/presskit.htm>.

92. See generally INTERNATIONAL CRIME THREAT ASSESSMENT 3-11 (Dec. 2000) available at [http://www.foia.cia.gov/docs/DOC\\_0000497956/DOC\\_0000497956.pdf](http://www.foia.cia.gov/docs/DOC_0000497956/DOC_0000497956.pdf) (assessment prepared by a U.S. Government interagency working group in support of and pursuant to the President's International Crime Control Strategy).

93. INTERPOL, AT WORK: ANNUAL REPORT 21 (2005) <http://www.interpol.int/content/download/770/6083/version/5/file/iaw2005.pdf>.

94. Michael Grunwald, *Internet Child Porn Ring Raided*, WASHINGTON POST (Sept. 3, 1998), <http://www.washingtonpost.com/wp-srv/washtech/daily/sept98/02/tech1.htm>.

95. U.N.D.P. Rep. on Human Development (2005), available at [http://hdr.undp.org/en/media/HDR05\\_chapter\\_5.pdf](http://hdr.undp.org/en/media/HDR05_chapter_5.pdf).

96. Steven Keeva, *Lawyers in the War Room*, 77 A.B.A. J. 52, 54 (1991).

century Grotius opined that "the impact of economic interdependence or of military security [is such] that there is no state so powerful that it can dispense with the help of others."<sup>97</sup> Today, if the United States wants the cooperation of states to combat drug trafficking, it must bargain on other issues like global climate change and agricultural subsidies. If it wants a missile defense system in Eastern Europe, it must cease creating secret prisons and kidnapping for rendition the nationals from those states. The web of global interrelationships is a fact known to all heads of state and government; if not earlier, then certainly it was brought home on September 11, 2001.

The test of the rule of law does not come in ordinary times. As Louis Henkin has famously said, most nations obey most international law most of the time.<sup>98</sup> They do it every time an airplane flies from one country to another, every time the postal service delivers a letter with a foreign stamp on it, every time a foreign ship docks and its cargo is unloaded, every time a foreign film is distributed and shown, every time a diplomat or head of state is received within another state. The question is how well the law is enforced when it is inconvenient, costly, or society is under threat.

Some nations have not performed well in this regard, but it is critical to recognize that the failure is usually of law generally, not just international law. As we have seen in various countries, governments which perceive threats to their power or interests suspend constitutions or give them restricted application, exile or arrest dissidents, harass or kill disfavored minorities, and write memos justifying torture. It is perhaps demanding too much to expect international law to be respected by those who willfully disregard their own national laws and constitutional limitations and those who fail to distinguish threats to their political survival from threats to the national security. Claims that a head of state or government is above the law generally do not stop at international law but demand unlimited executive powers unrestrained by the legislature, the judiciary, or for that matter, conscience or morality.

Respect for the rule of law and political courage are necessary not only to resist the temptations of expanding power, but also to resist public calls for action and demands for retaliatory measures when lives have been taken and enemies fail to respect basic norms of conduct. The U.S. Civil War was a time of enormous bitterness and hostility, sometimes fanned by the press, and there were indeed failures of law, but also examples of where it held despite public pressure. When

---

97. Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1, 31 (1946).

98. LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2d ed. 1979).

reports of the conditions suffered by Union prisoners in Andersonville were widely reported, the Chicago Board of Trade sent a letter to President Lincoln urging that the federal government set aside an equal number of Confederate prisoners and subject them to the same treatment, ensuring that they would die; the Chicagoans called for “retaliatory measures as a matter of necessity.”<sup>99</sup> Instead, on April 24, 1863, President Lincoln approved General Orders No. 100,<sup>100</sup> today known as the Lieber Code, the first modern codification of the laws of war. Article 16 said “Military necessity does not admit of cruelty — that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions.”<sup>101</sup> The Lieber Code migrated to Europe, leading to the first Geneva conferences and conventions, emerging into international treaties and customary norms that are binding on all nations.

Thus, in conclusion, the nation must remain with Chief Justice Marshall and those who wrote the Constitution, who believed that the international rule of law needs to be respected and enhanced for our own interest — an interest indivisible from that of the rest of the world. A.H. Robertson, a prominent European human rights lawyer, poetically likened the effort to building the Cathedral of Strasbourg, which took over 350 years to complete, with mistakes along the way.<sup>102</sup> The individuals who began the work and who contributed a stone, window, or a statue, knew they would never see the entire magnificent monument that has stood now for more than five hundred years — no single day passing without some further adjustment or repair or addition being needed. While lawyers must not have the arrogance of thinking that they can solve every societal problem domestically, much less globally, they should also not settle for too little. There are great legal minds in the world, each of which can place his or her stone, statue, or window in the Cathedral being built. As Margaret Mead reportedly said: “Never doubt that a small group of thoughtful, committed individuals can change the world. Indeed, it is the only thing that ever has.”<sup>103</sup>

---

99. BRUCE CATTON, *A STILLNESS AT APPOMATTOX: THE ARMY OF THE POTOMAC TRILOGY* 277 (1990).

100. See *The Lieber Code of 1863: Instructions for the Government of Armies of the United States in the Field* (Apr. 24, 1863), available at <http://www.civilwarhome.com/liebercode.htm> (last visited Sept. 3, 2011).

101. *Id.*

102. Interview with A.H. Robertson, in *Strasbourg Fr.* (1971).

103. MARGARET MEAD, *MARGARET MEAD: THE STUDY OF CONTEMPORARY WESTERN CULTURES* 12 (Robert B. Textor ed., Berghahn Books 2005).